

No. 11596

United States
Circuit Court of Appeals
For the Ninth Circuit.

HENRY BRODERICK, INC.,
Appellant,
vs.
CLARK SQUIRE, individually and as Collec-
tor of Internal Revenue for the District of
Washington,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington
Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the
Western District of Washington
Southern Division

No. 832

HENRY BRODERICK, INC.,

Plaintiff,

vs.

CLARK SQUIRE, individually and as Collec-
tor of Internal Revenue for the District of
Washington,

Defendant.

COMPLAINT

Comes Now plaintiff and for first cause of action
against defendant, alleges:

I.

That plaintiff at all times herein mentioned was
and now is a corporation, duly organized and exist-
ing under the laws of the State of Washington, with
all license fees last due said state paid.

II.

That defendant at all times herein mentioned was
and now is a resident of Tacoma, Pierce County,
Washington, and the duly appointed, qualified and
acting Collector of Internal Revenue for the Dis-
trict of Washington, with his principal office at
Tacoma, Washington.

III.

That this action arises under the laws of the United States providing for internal revenue, being a suit for the recovery of internal revenue taxes erroneously and illegally assessed and collected under the Federal Insurance Contributions Act, Subchapter A of Chapter 9 of the Internal Revenue Code, 26 USCA Section 1400-1432, as amended, as hereinafter more fully appears.

IV.

That for many years plaintiff has been engaged as a duly licensed broker, with offices in the city of Seattle, King County, Washington, in the rental, lease and sale of real estate. That plaintiff conducts a general real estate business independently and has also operated in association with other independent brokers as joint adventurers in the rental, [1*] lease and sale of real estate.

V.

That the contract between plaintiff and each of such independent brokers is in writing, a copy of such written contract, except as to date of execution and as to name, being attached hereto as Exhibit A, and made a part hereof.

VI.

That under the contracts and in all their operations herein referred to, such brokers have constantly been free from any control or direction of plaintiff, and have operated their respective businesses in accordance with their entire and uncon-

trolled discretion, and only at such hours or times as they themselves might elect. That the labors and activities of such independent brokers in the conduct of their businesses and in the exhibition of properties and in effecting sales, rentals and leases of real estate are performed chiefly in the field and not in offices. That said brokers pay their own expenses and all fees or taxes arising from their activities as brokers, and obtain and maintain their individual brokers' licenses and have customarily engaged in the business of independent real estate brokerage. That said brokers are not employees of plaintiff, but are co-principals with plaintiff in joint adventures in the real estate brokerage business, and that plaintiff and such brokers have an equal proprietary interest in the commissions earned thereby, and one-half of such commissions are simultaneously received by such brokers, not as compensation paid by plaintiff for services performed by such brokers for plaintiff as their employer but as co-principals with plaintiff and by plaintiff.

VII.

That under date of July 30, 1945, plaintiff was notified of the assessment of additional internal revenue taxes for the period April 1, 1943, to March 31, 1945, on the ground that said independent brokers were taxable employees of plaintiff under said Federal Insurance Contributions Act, and demand was made upon it that said tax in the sum of \$1,938.63 be paid within ten days thereof.

That said brokers and the amount of [2] said tax applicable to each are set forth in a schedule attached hereto as Exhibit B and made a part hereof.

VIII.

That on August 3, 1945, plaintiff paid said sum to defendant under protest.

IX.

That on or about August 11, 1945, plaintiff duly filed with defendant as Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue, its claim for refund of said sum, Claim No. 481703.

X.

That under date of January 2, 1946, the Commissioner of Internal Revenue notified plaintiff that its claim for refund was disallowed.

XI.

That the assessment and collection of said taxes in the amount of \$1,938.63 and the disallowance of said claim for refund thereof were erroneous, illegal, capricious and wrongful, since none of the individuals in respect to whom said taxes were assessed were employees of plaintiff within the meaning of said act. That plaintiff is entitled to a refund of, and defendant is indebted to plaintiff for the said sum of \$1,938.63, with interest at 6% per annum from August 3, 1945.

And for a second and further cause of action against defendant, plaintiff alleges:

I.

That Paragraphs I and II of plaintiff's first cause of action are, by this reference, incorporated herein and made a part hereof.

II.

That this action arises under the laws of the United States providing for internal revenue, being a suit for the recovery of internal revenue taxes erroneously and illegally assessed and collected under the Federal Unemployment Tax Act, Subchapter C of Chapter 9 of the Internal [3] Revenue Code, 26 USCA Section 1600-1611, as amended, as hereinafter more fully appears.

III.

That Paragraphs IV, V and VI of plaintiff's first cause of action, are, by this reference, incorporated herein and made a part hereof.

IV.

That under date of July 26, 1945, plaintiff was notified of the assessment of additional internal revenue taxes for the period from January 1, 1943, to December 31, 1943, on the ground that said independent brokers were taxable employees of plaintiff under said Federal Unemployment Tax Act, and demand was made upon it that said tax in the sum of \$1,042.00 be paid within ten days thereof. That said brokers and the amount of said tax applicable to each are set forth in a schedule attached hereto as Exhibit B and made a part hereof.

V.

That on August 3, 1945, plaintiff paid said sum to defendant under protest.

VI.

That on or about August 11, 1945, plaintiff duly filed with defendant as Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue, its claim for refund of said sum, Claim No. 814304.

VII.

That under date of January 2, 1946, the Commissioner of Internal Revenue notified plaintiff that its claim for refund was disallowed.

VIII.

That the assessment and collection of said taxes in the amount of \$1,042.00 and the disallowance of said claim for refund thereof were erroneous, illegal, capricious and wrongful, since none of the individuals in respect to whom said taxes were assessed were employees of plaintiff within the meaning of said act. That plaintiff is entitled to a refund of, [4] and defendant is indebted to plaintiff for the said sum of \$1,042.00, with interest at 6% per annum from August 3, 1945.

And for a third and further cause of action against defendant, plaintiff alleges:

I.

That Paragraphs I, II, and III of plaintiff's second cause of action are, by this reference, incorporated herein and made a part hereof.

II.

That under date of July 26, 1945, plaintiff was notified of the assessment of additional internal revenue taxes for the period from January 1, 1944, to December 31, 1944, on the ground that said independent brokers were taxable employees of plaintiff under said Federal Unemployment Tax Act, and demand was made upon it that said tax in the sum of \$1,380.05 be paid within ten days thereof. That said brokers and the amount of said tax applicable to each are set forth in a schedule attached hereto as Exhibit B and made a part hereof.

III.

That on August 3, 1945, plaintiff paid said sum to defendant under protest.

IV.

That on or about August 11, 1945, plaintiff duly filed with defendant as Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue, its claim for refund of said sum, Claim No. 814305.

V.

That under date of January 2, 1946, the Commissioner of Internal Revenue notified plaintiff that its claim for refund was disallowed.

VI.

That the assessment and collection of said taxes in the amount of \$1,308.05 and the disallowance of said claim for refund thereof, [5] were erroneous,

illegal, capricious and wrongful, since none of the individuals in respect to whom said taxes were assessed were employees of plaintiff within the meaning of said act. The plaintiff is entitled to a refund of, and defendant is indebted to plaintiff for said sum of \$1,380.05, with interest at 6% per annum from August 3, 1945.

Wherefore, plaintiff prays for judgment against defendant as follows:

1. On the first cause of action for the sum of \$1,938.63, together with interest thereon as provided by law.

2. On the second cause of action for the sum of \$1,042.00, together with interest thereon as provided by law.

3. On the third cause of action for the sum of \$1,380.05, together with interest thereon as provided by law.

4. For such other and further relief in the premises as may be judged equitable, including plaintiff's costs and disbursements herein.

EGGERMAN, ROSLING &
WILLIAMS,

/s/ ROBERT G. MOCH,

Attorneys for Plaintiff. [6]

EXHIBIT B

Name of Individual to whom tax applicable	Salary from April 1, 1943 to March 31, 1945 to which Federal Insurance Contri- bution Act applied	Salary from Jan. 1, 1943 to Dec. 31, 1943 to which Federal Unemployment Act applied	Salary from Jan. 1, 1944 to Dec. 31, 1944 to which Federal Unemployment Act applied
Levison, Harry E.....	\$ 6,312.50	\$ 3,000.00	\$ 3,000.00
McKenzie, Grace E.....	1,367.75	1,395.74	598.12
Samsel, Howard Z.....	6,443.08	3,000.00	3,000.00
Hatfield, Jessie	7,687.27	3,000.00	3,000.00
Eddy, Howard M.....	6,843.69	3,000.00	3,000.00
Bangasser, Paul E.....	6,349.93	3,000.00	3,000.00
Wilson, Melville	7,596.33	3,000.00	3,000.00
Schofield, James	528.25	125.00	403.25
Charteris, Myrtle	3,575.78	669.45	2,202.89
Said, A. A.	670.75	645.75	25.00
McCracken, J. D.	6,000.00	3,000.00	3,000.00
Bean, Harold R.	127.12	179.10	52.50
Runkel, Henry G.	5,897.99	3,000.00	3,000.00
Mills, H. Dennis	50.00	547.49	.....
Fleming, John H.....	7,027.87	2,796.26	3,000.00
Payne, Lorin A.....	5,200.00	1,361.25	3,000.00
Downs, M. Ross.....	6,095.00	95.00	3,000.00
Levenson, Samuel	115.31	115.31	.....
Evans, Paul G.	5,154.38	.....	3,000.00
McRae, Angus	649.94	.....	649.94
McLean, L. L.	1,740.58	.....	1,740.58
Rorabeek, Calvin M.....	2,549.95	.....	1,825.83
Holeombe, S. R.	1,732.08	.....	1,259.58
Barton, Fred	941.25	.....	.....
Leitch, Robert	825.00	.....	.....
Total Salary	91,481.80	31,930.35	44,757.69
Tax thereon	1,829.66	957.91	1,342.73
Interest Paid	108.97	84.09	37.32
Total Assessment ...	\$ 1,938.63	\$ 1,042.00	\$ 1,380.05

[Endorsed]: Filed Feb. 13, 1946. [7]

[Title of District Court and Cause.]

ANSWER

Now comes Clark Squire, defendant, by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and in answer to the first cause of action alleged by plaintiff in its complaint, admits, denies, and alleges as follows:

I.

Defendant admits all of the allegations contained in paragraph I thereof, except he states that he has no knowledge or information sufficient to form a belief as to the truth of plaintiff's allegation that all license fees last due said state have been paid.

II.

Defendant admits all of the allegations contained in paragraph II thereof.

III.

Defendant admits all of the allegations contained in paragraph III thereof except he denies that said internal revenue taxes were erroneously and illegally assessed and collected. [8]

IV.

Defendant states that he has no knowledge or information sufficient to form a belief as to the truth of plaintiff's allegations contained in paragraph IV thereof.

V.

Defendant states that he has no knowledge or information sufficient to form a belief as to the truth

of plaintiff's allegations in paragraph V thereof, except defendant admits that a written contract form identified as Exhibit A is attached to the complaint.

VI.

Defendant denies all of the allegations contained in paragraph VI thereof.

VII.

Defendant admits all of the allegations contained in paragraph VII thereof, except he denies that said so-called "brokers" were in fact brokers in their said dealing with plaintiff.

VIII.

Defendant admits all of the allegations contained in paragraph VIII thereof, except he denies that said sum was paid on August 3, 1945, and alleges that same was paid on August 4, 1945.

IX.

Defendant admits all of the allegations contained in paragraphs IX and X thereof.

X.

Defendant denies all of the allegations contained in paragraph XI thereof.

Now comes the defendant, as aforesaid, and in answer to the second cause of action alleged by plaintiff in its complaint, admits, denies and alleges as follows: [9]

I.

In answer to paragraph I thereof defendant states that paragraphs I and II of defendant's an-

swer to plaintiff's first cause of action are by this reference incorporated herein and made a part hereof.

II.

Defendant admits all of the allegations contained in paragraph II thereof except he denies that said internal revenue taxes were erroneously and illegally assessed and collected.

III.

In answer to paragraph III thereof defendant states that paragraphs IV, V and VI of defendant's answer to plaintiff's first cause of action are by this reference incorporated herein and made a part hereof.

IV.

Defendant admits all the allegations contained in paragraph IV thereof except he denies that said so-called "brokers" were in fact brokers in their said dealing with plaintiff.

V.

Defendant admits all the allegations contained in paragraphs V, VI and VII thereof, except he denies that said payment was made by plaintiff on August 3, 1945, and alleges that same was made on August 4, 1945.

VI.

Defendant denies all of the allegations contained in paragraph VIII thereof.

Now comes the Defendant, as aforesaid, and as to the third cause of action alleged by Plaintiff in its complaint, admits, denies and alleges as follows:

I.

In answer to paragraph I thereof Defendant states that paragraphs I, II and III of Defendant's answer to Plaintiff's second cause of action are by this reference incorporated herein and made a part hereof.

II.

Defendant admits all the allegations contained in paragraph II thereof, except he denies that said so-called "brokers" were in fact brokers in their said dealings with plaintiff.

III.

Defendant admits all the allegations contained in paragraphs III, IV and V thereof except he denies that said sum was paid by plaintiff on August 3, 1945, and alleges that the same was paid on August 4, 1945.

IV.

Defendant denies all the allegations contained in paragraph VI thereof.

Wherefore Defendant prays for judgment, dismissing the Plaintiff's complaint herein, costs of suit and such other and further relief to which the Court may deem the Defendant entitled.

J. CHARLES DENNIS,

United States Attorney.

HARRY SAGER,

Assistant United States

Attorney.

THOMAS R. WINTER,

Special Assistant to Chief

Counsel.

[Endorsed]: Filed April 19, 1946. [11]

[Title of District Court and Cause.]

MEMORANDUM OPINION

The plaintiff, Henry Broderick, Inc., seeks a judgment for refund of taxes and interest collected by the defendant, Clark Squire, Collector of Internal Revenue. The issue presented by this controversy is whether the persons upon whose earnings the tax was collected were in fact employees within the meaning of the Social Security Act, or whether they were independent contractors.

The statutes and regulations involved are:

Federal Insurance Contributions Act,
26 USCA, Sec. 1400-1432, as amended.

Federal Unemployment Tax Act,
26 USCA, Sec. 1600-1611.

Neither of the two Federal statutes referred to define the term "employee."

The regulation involved is designated as Sec. 402.204 of Regulation 106. This regulation states:

"Every individual is an employee if the [12] relationship between him and the person for whom he performs services is the regular relationship of employer and employee."

It then provides:

"In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means or methods of accomplishing the result, he is an independent contractor."

For the purpose of further clarifying the regulation, in April, 1943, the Acting Commissioner of Internal Revenue in Mimeograph 5504 Accumulative Bulletin, January, 1943, page 1066, ruled that real estate salesmen are employees of brokers for Federal Employment Tax purposes even though their compensation is based upon commissions from sales.

The facts as disclosed by the record in this case, from documentary and oral evidence offered at the time of trial by the plaintiff—there being no evidence offered by the defendant—may be briefly summarized as follows:

A written agreement was entered into by the plaintiff with the persons whose remuneration became the subject of the tax herein. This agreement provided that one engaged in selling real estate in connection with the plaintiff's activities in that field must be the holder of a real estate broker's license of the State of Washington, in full force and effect. It also provided that it was the intent of the plaintiff and the persons who signed the agreement that the relationship between them was that of "an independent contractor, and not a servant, employee, joint adventurer or partner." The brokers agreed to sell real estate for clients of the plaintiff upon a commission basis. Such sales were made of properties listed with the plaintiff and all contractual relationships between the owner of the property and the seller of the property were with the plaintiff herein. The commission received from such activity became the property of the plaintiff. When a transaction was finally consummated and commis-

sions were paid, the plaintiff would divide the proceeds of such commission equally between [13] itself and the individual broker who made the sale. The plaintiff maintained an office properly equipped with furnishings and staff suitable to serving the public as a real estate broker. It was one of the leading and well known real estate brokerage concerns in the City of Seattle enjoying the goodwill of and a reputation for fair dealing with the public. Each broker was supplied with desk room in the plaintiff's office, as well as telephone, switchboard service and reasonable and necessary stenographic services, and the plaintiff in its sole discretion might mention in its advertising the name of the person engaged in selling. All current listings were available to such brokers; the plaintiff, however, reserving the right to place in the temporary possession of any one of them exclusive privileges of sale. Regular sales meetings were attended by both its salaried real estate salesmen and the brokers herein involved, though there was no compulsory requirement that a broker be in attendance. At these meetings discussions were had regarding matters of the business of selling, and assignments of listed property were made by the plaintiff. Any broker was free to make a choice of listings but this was subject to such limitations as the plaintiff might impose. Either the plaintiff or its brokers might terminate the relationship existing between them at will, and generally the brokers were given a free hand as to whether they would devote all or part of their time to the service of selling listed real

estate for the plaintiff, although, on the other hand, if they should undertake to sell real estate for other brokers or make sales in their own name and on their own behalf they would be considered as violating the obligations they had assumed and be discharged.

The foregoing summarizes the facts as established by the evidence in this case disclosing the nature of the services rendered to the plaintiff by the brokers and the form of remuneration paid such brokers by the plaintiff.

Plaintiff insists that there are three essential elements that must be found before the brokers could be classified as employees. These are as follows:

(1) Wages as remuneration for employment must have been paid to the brokers.

(2) These must have been paid by and from funds belonging to the plaintiff.

(3) The services must have been performed by the broker for the plaintiff as his employee.

It seems to me these facts I have of the relationship existing between the parties, fairly meet each of the tests enumerated.

(1) The remuneration was paid in all instances by the plaintiff to its broker. It is true that it was not denominated wages, nor was it a fixed amount for a given period of time, but it was definite in amount whenever plaintiff realized a commission on the sale of real estate. It was not paid to the broker by the plaintiff un-

til after the plaintiff had collected the commission from its client. It thus became the only remuneration that the broker received for his services and the receipt thereof was in all instances from the plaintiff and not from the client for whom the sale was made.

(2) It was paid by and from funds that belonged to the plaintiff, since all commissions from the sales made by the brokers became the property of the plaintiff. The fact that they were deposited in a separate fund instead of in the profit and loss account of the plaintiff, in no way altered the plaintiff's complete control over such funds. Any failure on the part of a client to account for commissions in a real estate sale gave rise to no claim or cause of action whatever on the part of the broker against such client. The plaintiff alone could institute and maintain such action, because the plaintiff alone was the responsible party at all stages throughout every real estate transaction and had the sole power to make such sale through its licensed brokers, officers, its licensed salesmen, or through the licensed brokers whose earnings are involved in this litigation.

(3) The services of the broker in negotiating the transactions [15] in the name and on behalf of the plaintiff herein were services of a representative and agent, and not as a principal, even though the broker himself may have considered himself an independent contractor.

The first and second elements essential to constitute the employer-employee relationship as stated by the plaintiff, clearly exist in this case, and, when we apply the established facts to the Federal Social Security Statute involved herein, and give application to the regulations and interpretations announced by the Commissioner of Internal Revenue and the various Federal Court decisions, there is little room for doubt that the employer-employee relationship does exist in this case.

The opinion of the Acting Commissioner of Internal Revenue of April, 1943, was based upon a set of facts, (whether they be real or imaginary) that are almost identical with the methods, practices and procedure existing between the plaintiff and its brokers, with the exception that there the agents were referred to as salesmen and here they are designated as brokers. It was held in this ruling that those engaged in making sales under the practice described in the opinion must be classified as employees for the purposes of the taxes imposed by Titles VIII and IX of the Social Security Act, the Federal Insurance Contribution Act and the Federal Employment Tax Act.

I find therefore:

- (1) That the brokers received remuneration for services rendered to the plaintiff.
- (2) That such remuneration was paid them by and from funds belonging to the plaintiff.
- (3) That the services they rendered for which they received compensation were per-

formed for the plaintiff, thus creating the employer-employee relationship as created by the provisions of the Social Security Act.

The plaintiff relies heavily upon a determination of this identical issue made by the Supreme Court of the State of Washington in *Henry Broderick, Inc., v. Riley*, 22 Wn (2d) 760, where that court, in considering the applicability of the State's Unemployment Compensation [16] Law upon the identical facts herein involved, found that the brokers were independent contractors and that the relationship of employer-employee did not exist. This opinion is by a divided court, and while it is entitled to great weight and consideration, it cannot be controlling on this Court in construing the Federal statute, even though there be a great similarity between the two.

Congress conferred upon the Treasury Department the responsibility of promulgating regulations to make effective the Social Security Laws and also gave them the right to construe such laws in the first instance. The construction given by the Commissioner of Internal Revenue to a hypothetical set of facts which are almost identical to the actual facts involved in this case, determined that the employer-employee relationship existed, rather than that of independent contractor as defined by Regulation 106 of Section 402.204, Treasury Regulations. This Court is bound to accept and follow the Treasury Department's rulings rather than that of a State court of last resort. The decision of this issue

in the State Supreme Court or a court of last resort of any of the States from which decisions have been cited, cannot be taken as precedents in this case. In referring to decisions of courts of last resort of the various states, the Supreme Court of the United States said:

“Congress no more intended to import this mass of technicality as a controlling ‘standard’ for uniform national application than to refer decision of the question outright to the local law.”

National Labor Relations Board v. Hearst Publications. 322 U. S. 111.

In the Hearst Publications case, *supra*, the Supreme Court of the United States was construing the National Labor Relations Act, but, in so doing, they announced certain principles that have since been followed in the construction by the Courts of the Social Security Act, and these principles have become the law applicable to the facts in this case.

This Court in *Emard v. Squire*, 58 F. Supp. 281, gave application to well recognized common law distinctions between the employer- [17] employee and the independent contractor relationship. This was upon the erroneous assumption that the Hearst case, *supra*, which had been decided some eight months previously, applied only to the National Labor Relations Act. Since this Court wrote that opinion, the Circuit Court of this Circuit, in *U. S. v. Aberdeen Aerie of Eagles*, 148 F. 2nd 655, adopted the principle and reasoning of the Hearst case as being

applicable to the Social Security Act, in the following language:

“The case against the Hearst Publications served to shatter the illusion fostered in the past that there is some simple, uniform and easily applicable test which the courts have used, in dealing with problems involving the employer-employee relationship, to determine whether persons doing work for others are employees or independent contractors.” * * * “The applicability of the statute is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability * * *.”

In the *Eagles* case, *supra*, the Court further approves the pronouncement found in *U. S. v. Vogue*, 145 F. 2d 609, Fourth Circuit, wherein it was said:

“The purpose of the Act (Social Security) was to provide old age, unemployment and disability insurance for workers in industry. * * * Common law rules as to distinctions between servants and independent contractors throw but little light on the question involved. The Social Security Act, like the Fair Labor Standards Act, and the National Labor Relations Act, was enacted pursuant to a public policy unknown to the common law; * * *”

Thus, we have a statement of law controlling in this Court in reference to determining distinctions between servant and independent contractor. All Federal cases involving the employer-employee re-

lationship, whether they be constructions of the Social Security Act, the National Labor Relations Act, or the Fair Labor Standards Act, become precedents in the instant case.

The most recent expression of the Federal Courts on this question of employer-employee relationship in matters of this nature, construing the Social Security Act, is found in *Grace v. McGruder*, 148 F. 2d 679, Court of Appeals, District of Columbia, in which the following statement appears: [18]

“That the common law cases which define employee and independent contractors are not controlling * * *”

“The Social Security Act, like the Fair Labor Standards Act and the National Labor Relations Act were enacted pursuant to public policy unknown to the common law * * *”

The facts as found, when subjected to the interpretations of the Social Security Act by the Commissioner of Internal Revenue and the Federal Courts, support the determination made at the time the taxes herein were levied by the Collector of Internal Revenue, and the judgment, therefore, will be one dismissing the plaintiff's action. Appropriate Findings of Fact and Conclusions of Law and Decree may be submitted upon notice.

Dated this 11th day of December, 1946.

CHARLES H. LEAVY,
United States District Judge.

[Endorsed]: Filed Dec. 11, 1946. [19]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 12th day of November, 1946, before the above-entitled court, Honorable Charles H. Leavy presiding therein, sitting without a jury, plaintiff appearing by its attorneys, Eggerman, Rosling & Williams, being represented in court by Donald G. Eggerman, and the defendant appearing by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington; Harry Sager, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, being represented in court by Thomas R. Winter, and witnesses having been sworn and having testified, exhibits introduced in evidence, oral argument made and written briefs filed, the Court having rendered a Memorandum Opinion, and the Court being fully advised, now makes the following

FINDINGS OF FACT

I.

That the plaintiff now is and at all times material herein was a corporation duly organized and existing under and by virtue of the laws of the State of Washington with all license fees last due said State paid. [20]

II.

That the defendant at all times material herein

was, and now is, a resident of Tacoma, Pierce County, Washington, and the duly appointed, qualified and acting Collector of Internal Revenue for the District of Washington with his principal office at Tacoma, Washington.

III.

That this is a suit in three causes of action and arises under the laws of the United States providing for internal revenue, being a suit for the recovery of internal revenue taxes assessed and collected under the Federal Insurance Contributions Act for the period from April 1, 1943, to March 31, 1945, Subchapter A of Chapter 9 of the Internal Revenue Code (26 U.S.C.A., Sections 1400-1432, as amended), and under the Federal Unemployment Tax Act for the years 1943 and 1944, Subchapter C of Chapter 9 of the Internal Revenue Code (26 U.S.C.A., Sections 1600-1611, as amended).

IV.

A written agreement was entered into by the plaintiff with the persons whose remuneration became the subject of the tax herein. This agreement provided that one engaged in selling real estate in connection with the plaintiff's activities in that field must be the holder of a real estate broker's license of the State of Washington, in full force and effect. It also provided that it was the intent of the plaintiff and the persons who signed the agreement that the relationship between them was that of "an independent contractor, and not a servant, employee, joint adventurer or partner." The brokers agreed

to sell real estate for clients of the plaintiff upon a commission basis. Such sales were made of properties listed with the plaintiff and all [21] contractual relationships between the owner of the property and the seller of the property were with the plaintiff herein. The commission received from such activity became the property of the plaintiff. When a transaction was finally consummated and commissions were paid, the plaintiff would divide the proceeds of such commission equally between itself and the individual broker who made the sale. The plaintiff maintained an office properly equipped with furnishings and staff suitable to serving the public as a real estate broker. It was one of the leading and well known real estate brokerage concerns in the City of Seattle enjoying the goodwill of and a reputation for fair dealing with the public. Each broker was supplied with desk room in the plaintiff's office, as well as telephone, switchboard service and reasonable and necessary stenographic services, and the plaintiff in its sole discretion might mention in its advertising the name of the person engaged in selling. All current listings were available to such brokers; the plaintiff, however, reserving the right to place in the temporary possession of any one of them exclusive privileges of sale. Regular sales meetings were attended by both its salaried real estate salesmen and the brokers herein involved, though there was no compulsory requirement that a broker be in attendance. At these meetings discussions were had regarding matters of the business of selling, and assignments of listed prop-

erty were made by the plaintiff. Any broker was free to make a choice of listings but this was subject to such limitations as the plaintiff might impose. Either the plaintiff or its brokers might terminate the relationship existing between them at will, and generally the brokers were given a free hand as to whether they would devote all or part of their time to the services of selling listed real estate for the plaintiff, [22] although on the other hand, if they should undertake to sell real estate for other brokers or make sales in their own name and on their own behalf they would be considered as violating the obligations they had assumed, and be discharged.

V.

Each broker pays his own bond premium for broker's license, license fee, business and occupation taxes, car expenses, insurance, and other expenses incident to the conduct of his services as a real estate broker. The brokers in question do not have any regular time or hours, and work on deals whenever it is convenient to them to do so. They are not required to make any specific calls during the day by plaintiff, and are not required to give their entire time to the business of selling real estate.

VI.

That from the foregoing the Court finds the following ultimate facts:

(1). That wages for remuneration for employment were paid by the plaintiff to the broker salesmen.

(2). That these wages were paid by and from funds belonging to the plaintiff.

(3). That the services were performed by the broker salesmen for the plaintiff as its employees.

VII.

That on or about July 30, 1945, plaintiff was notified that an assessment for additional internal revenue taxes for the period April 1, 1943, to March 31, 1945, was being made on the ground that said broker salesmen were taxable employees of plaintiff under the Federal Insurance Contributions Act and demand was made upon it that the tax liability in the sum of \$1,938.63 be paid within ten days thereof. [23] That the said broker salesmen and the amount of said tax applicable to each are set forth in a schedule attached to the complaint, marked Exhibit "B," and which sum was paid by the plaintiff under protest on August 4, 1945.

VIII.

That on or about July 26, 1945, plaintiff was notified that an assessment for additional internal revenue taxes for the period January 1, 1943, to December 31, 1943, and for the period January 1, 1944, to December 31, 1944, was being made on the ground that said broker salesmen were taxable employees of plaintiff under the Federal Unemployment Tax Act and demand was made upon it that the tax liability in the sums of \$1,042.00 and \$1,380.05, respectively, be paid within ten days thereof. That the said broker salesmen and the

amount of said taxes applicable to each are set forth in a schedule attached to the complaint, marked Exhibit "B," and which sums were paid by the plaintiff under protest on August 4, 1945.

IX.

That on or about August 11, 1945, plaintiff duly filed with the defendant, Collector of Internal Revenue for the District of Washington, for consideration of the Commissioner of Internal Revenue for its claims for refund Nos. 481,703, 814,304 and 814,305.

X.

That under date of January 2, 1946, the Commissioner of Internal Revenue notified plaintiff that its claims for refund were disallowed.

XI.

That this action was timely brought on or about February 13, 1946. [24]

From the foregoing Findings of Fact the Court makes the following

CONCLUSIONS OF LAW

I.

That the relationship existing between plaintiff's broker salesmen and the plaintiff for all times material herein is that of employee and employer within the meaning of the Federal Insurance Contributions Act, Subchapter A of Chapter 9 of the Internal Revenue Code (26 U.S.C.A., Sections 1400-1432,

as amended), and within the meaning of the Federal Unemployment Tax Act, Subchapter C of Chapter 9 of the Internal Revenue Code (26 U.S.C.A., Sections 1600-1611, as amended).

II.

That the taxes assessed and collected were in all respects legal and in strict accordance with the law.

III.

That judgment should be entered dismissing plaintiff's complaint and with costs to be taxed against the plaintiff in the sum of \$10.00.

Dated this 27th day of January, 1947.

/s/ CHARLES H. LEAVY,
United States District Judge.

Presented at entry thereof and excepted thereto.

/s/ JOSEPH J. LANZA,
Of Counsel for Plaintiff.

Presented by:

/s/ THOMAS R. WINTER,
Spec. Asst. to the Chief
Counsel.

[Endorsed]: Filed Jan. 22, 1947. [25]

In the District Court of the United States for the
Western District of Washington, Southern
Division

Civil No. 832

HENRY BRODERICK, INC.,

Plaintiff,

vs.

CLARK SQUIRE, Individually and as Collector
of Internal Revenue for the District of Wash-
ington,

Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial on the 12th day of November, 1946, before the above-entitled court, Honorable Charles H. Leavy presiding therein, sitting without a jury, plaintiff appearing by its attorneys, Eggerman, Rosling & Williams, being represented in court by Donald G. Eggerman, and the defendant appearing by his attorneys, J. Charles Dennis, United States Attorney for the Western District of Washington; Harry Sager, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to the Chief Counsel, Bureau of Internal Revenue, being represented in court by Thomas R. Winter, and witnesses having been sworn and having testified, exhibits introduced in evidence, oral argument made

and written briefs filed, the Court having rendered a Memorandum Opinion, and the Court having made and entered its Findings of Fact and Conclusions of Law herein, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiff's complaint be, and the same is, hereby dismissed with [26] prejudice, with costs in the sum of \$10.00 taxed against the plaintiff.

Dated this 27th day of January, 1947.

/s/ CHARLES H. LEAVY,
United States District Judge.

Present at entry thereof and excepted thereto.

/s/ JOSEPH J. LANZA,
Of Counsel for Plaintiff.

Presented by:

/s/ THOMAS R. WINTER.

[Endorsed]: Filed Jan. 27, 1947. [27]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that Henry Broderick, Inc., a corporation, Plaintiff above-named, hereby appeals to the Circuit Court of Appeals for the

Ninth Circuit, from the final judgment in this action on January 27, 1947.

D. G. EGGERTSON
 JOSEPH J. LA
 EGGERTSON, F
 WILLIAMS,
 Attorneys for

Received a copy of the within notice of March, 1947.

J. CHARLES D
 U. S. Attorney
 Defendant

Copy of the above Notice of Judgment of Thos. R. Winter, Attorney for U. S. District Court, District of Columbia, Bureau, Smith Tower, Seattle, Washington, the 17th day of March, 1947.

E. E. REDBAY
 Deputy Clerk

[Endorsed]: Filed March 17,

[Title of District Court and Cause]

Clark Squire

in the State of Washington, as surety, are held firmly bound unto Clark Squire, individually as Collector of Internal Revenue for the District of Washington, Defendant in the above-entitled case, in the sum of Two Hundred Fifty Dollars (\$250.00).

Sealed with our seals and dated this 28th day of February, 1947.

The Condition of this Obligation is Such, that

Whereas, the District Court of the United States for the Western District of Washington, Southern Division, on the 27th day of January, 1947, in the above-entitled action, entered its judgment dismissing Plaintiff's complaint with prejudice, with costs in the sum of \$10.00 taxed against Plaintiff, and

Whereas, the above-named principal has heretofore given due and proper notice that it appeals from said judgment to the United States Court of Appeals for the Ninth Circuit;

Now Therefore, if the said principal, H. Broderick, Inc., shall pay [29] all costs that may be awarded against it if the appeal is dismissed, the judgment affirmed, or all such costs as the appellate court may award if the judgment is modified, then this obligation to be void; otherwise to remain in full force and effect.

State of Washington,
County of King—ss.

On the 28th day of February, 1947, before me personally appeared Gerry L. White, to me known to be the Attorney-in-Fact of the corporation that executed the within and foregoing instrument, as surety, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] R. E. EICKMAN,
Notary Public in and for the State of Washington,
residing at Seattle.

State of Washington,
County of King—ss.

On the 28th day of February, 1947, before me personally appeared Joseph J. Lanza, to me known to be one of the attorneys for and on behalf of said Henry Broderick, Inc., a corporation, that executed the within and foregoing instrument as principal, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation and association for the uses and purposes therein mentioned and on oath stated that he was authorized to execute said instrument.

In Witness Whereof I have hereunto set my hand and official seal the day and year first above written.

[Seal] KATHRYN BRYAN,
Notary Public in and for the State of Washington,
residing at Seattle.

[Endorsed]: Filed March 17, 1947. [30]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The following is a statement of points on which Appellant intends to rely on appeal:

1. That there is no substantial evidence in the record to support the finding of the District Court that wages for remuneration for employment were paid by the Plaintiff to the broker-salesmen.

2. That there is no substantial evidence in the record to support the finding of the District Court that these wages were paid by and from funds belonging to the Plaintiff.

3. That there is no substantial evidence in the record to support the finding of the District Court that the services were performed by the broker-salesmen for the Plaintiff as its employees.

4. That the District Court erred in concluding that the relationship existing between Plaintiff's broker-salesmen and the Plaintiff was that of em-

ployee and employer within the meaning of the Federal Insurance Contributions Act, and within the meaning of the Federal Unemployment Tax Act.

5. That the District Court erred in concluding that the taxes assessed and collected were in all respects legal and in strict accord with the law.

6. That the District Court erred in entering its judgment dismissing [31] Plaintiff's complaint.

Dated this 14th day of March, 1947.

D. G. EGGERMAN,
JOSEPH J. LANZA,
EGGERMAN, ROSLING &
WILLIAMS,

Attorneys for Appellant
Henry Broderick, Inc.

Received a copy of the within Statement this 14th day of March, 1947.

J. CHARLES DENNIS,
U. S. Attorney, Attorney for
Defendant.

[Endorsed]: Filed March 17, 1947. [32]

[Title of District Court and Cause.]

PLAINTIFF'S AMENDED DESIGNATION OF
RECORD, PROCEEDINGS, AND EVIDENCE
TO BE CONTAINED IN THE
RECORD ON APPEAL

Comes now the Plaintiff above-named, and pursuant to Rule 75 of the Rules of Civil Procedure

pertaining to record on appeal to the Circuit Court of Appeals, herewith designates the following portions of the record, proceedings and evidence to be contained in the record on appeal:

1. Complaint and Exhibit "B" thereto attached.
2. Answer.
3. Court's Memorandum Opinion.
4. Findings of Fact and Conclusions of Law.
5. Judgment.
6. Reporter's transcript of the evidence, two copies of which are being filed herewith.
7. Stipulation and order correcting exhibit number.
8. Plaintiff's Exhibit 1 and Defendant's Exhibits A-1 to A-7 inclusive.
9. Notice of Appeal to Circuit Court of Appeals.
10. Cost bond on appeal.
11. Plaintiff's amended designation of contents of record on appeal.
12. Statement of points on which Appellant intends to rely on appeal. [33]
13. Certificate of Clerk to transcript of record on appeal.

Dated this 20th day of March, 1947.

D. G. EGGERMAN,
JOSEPH J. LANZA,
EGGERMAN, ROSLING &
WILLIAMS,
Attorneys for Plaintiff.

Received a copy of the within designation this
21st day of March, 1947.

THOMAS R. WINTER,
Of Attorneys for Defendant.

[Endorsed]: Filed March 24, 1947. [34]

[Title of District Court and Cause.]

STIPULATION AND ORDER CORRECTING
EXHIBIT NUMBER

It is hereby stipulated between the parties hereto through their respective attorneys of record that the exhibit number of three business cards of Melville Wilson, M. Ross Downs and Fred J. O'Brien, which were marked by the clerk as "Plf's No. 2" be corrected to read "Def's No. A-7" and that said exhibit as so corrected will be considered as having been admitted in this cause as defendant's exhibit No. A-7.

/s/ JOSEPH J. LANZA,
Of Attorneys for Plaintiff.

/s/ THOMAS R. WINTER,
Of Attorneys for Defendant.

ORDER

Upon the foregoing stipulation,

It Is Ordered that the Clerk is hereby directed to correct the identification marking of said exhibit

from "Plf's No. 2" to "Def's No. A-7" and that said exhibit so corrected is to be considered as having been admitted in this cause as Defendant's exhibit No. A-7.

/s/ CHARLES H. LEAVY,
U. S. District Judge.

Presented by:

HARRY SAGER,
Of Attorneys for Defendant.

[Endorsed]: Filed March 24, 1947. [35]

[Title of District Court and Cause.]

DEFENDANT'S DESIGNATION OF ADDI-
TIONAL PORTION OF RECORD AND
PROCEEDINGS TO BE CONTAINED IN
THE RECORD ON APPEAL

Comes now the defendant above-named, and pursuant to Rule 75 of the Rules of Civil Procedure pertaining to Record on Appeal to the Circuit Court of Appeals, herewith designates the following additional portion of the record and proceedings to be contained in the record on appeal:

1. The reporter's transcript of the statement of the Court with respect to the testimony of plaintiff's

witness, Melville Wilson, two copies
being filed herewith.

Dated this 25th day of March, 1947

/s/ J. CHARLES D.

United States

/s/ HARRY SAGE

Assistant Un

Attorney

/s/ THOMAS R. W

Special Assistant to the Chief Co

Internal Revenue. Attorneys

Received a copy of the within
25th day of March, 1947.

JOSEPH J. LA

Of Attorneys

[Endorsed]: Filed Mar. 29, 1947

“The Court: * * *

* * * * *

“There are certain facts in dis
connection I might say that I can

tions that they were furnishing here, and then had him go out on his own and transact the business of feel that other firms without at least the contract that apparently the officers of the corporation stated was made.”

* * * * *

[Endorsed]: Filed Mar. 29, 1947. [37]

No. 832

PLAINTIFF'S EXHIBIT No. 1

Agreement

Henry Broderick Inc., hereinafter designated as “First Party”, and.....hereinafter designated as “Second Party”, in consideration of the mutual covenants and promises herein contained, agree as follows:

(1) First and Second Parties respectively warrant that they are licensed and authorized to act as real estate brokers in the State of Washington, and each agrees during the term hereof at his own expense to keep his license as broker in full force and

(2) It is agreed that First Party is duly qualified to and does procure the listing of real estate for sale, lease or rental, and prospective purchasers, lessees and renters therefor, and has and enjoys the good-will of and a reputation for fair dealing with the public, and also has and maintains an office, properly equipped with furnishings and staff, suitable to serving the public as a real estate broker, and the parties hereto deem it to be to their mutual advantage to form the association hereinafter agreed to.

(3) First Party agrees to furnish Second Party a desk, with use of a telephone, at First Party's offices, now located at Second and Cherry Streets, Seattle, Washington, and to furnish switchboard service, including taking of calls for Second Party pertaining to the services referred to herein. First party will also furnish Second Party with such reasonable and necessary stenographic service as may be required for carrying out Second Party's portion of this agreement. It is understood that First Party advertises extensively and that Second Party will, at First Party's sole discretion, be mentioned in said advertising.

(4) First Party agrees to make available to Second Party all current listings of the office, except such as First Party may find expedient to place exclusively in the temporary possession of some other broker, and First Party agrees to assist Second Party in his work by advice and full cooperation in every way practicable. First Party has

within its organization experts in various fields pertaining to real estate, and Second Party will have the benefit of the advice and co-operation of such experts in connection with deals being handled by Second Party.

(5) Second Party agrees to work diligently and to exert his best efforts to sell, lease, or rent any and all real estate listed with First Party and available to Second Party under the terms of Paragraph (4) above, to solicit additional listings and customers in the name of First Party, and otherwise to promote the business of serving the public in real estate transactions to the end that each of the parties hereto may derive the greatest profit possible.

(6) The usual and customary commission shall be charged for any service performed hereunder unless First Party shall advise Second Party of any special contract relating to any particular transaction which he undertakes to handle. When Second Party shall perform any service hereunder whereby a commission is earned, said commission shall, when collected, be divided between First Party and Second Party and First Party shall receive 50 per cent, and Second Party 50 per cent, of the commissions realized by them on deals in which Second Party has participated, division of the commission to be made on that basis as the commission is received. Such division shall apply also to fees on appraisals. In the event of special arrangements with any client, or in the event property of First Party is listed, a special rate of commission may apply, such rate to

be agreed upon by First Party and Second Party. In no case shall First Party be liable to Second Party for any commission unless the same shall have been collected from the party for whom the service was performed. [38]

(7) First Party shall not be liable to Second Party for any expense incurred by the latter, or for any of the latter's acts or omissions, nor shall Second Party be liable to First Party for office help or expense insofar as First Party has heretofore agreed to provide the same, and Second Party shall have no authority to bind First Party by any promise or representation, unless specifically authorized in a particular transaction; but expenses for attorney's fees, costs, revenue stamps, abstracts and the like which must, by reason of some necessity, be paid from the commission, or which are incurred in the collection of, or the attempt to collect, the commission shall be paid by the parties in the same proportion as provided for herein in the division of commissions. First Party shall be under no obligation to Second Party to make any advances either for expenses or commissions. Second Party agrees to furnish transportation at his own expense for prospects which Second Party under this agreement contacts, and to pay at his own expense entertainment costs, club dues, and other expenses incident to the conduct of his services as a real estate broker.

(8) For orderly conduct of the business, First Party reserves the right to assign particular pros-

pects of the office to a broker or brokers associated with First Party and such broker or brokers shall have the exclusive right, together with First Party, to contact such prospect so long as such assignment is in effect and Second Party agrees not to interfere with such assignments to other brokers or with First Party and other brokers in handling the same. Second Party shall have entire discretion as to the handling of "leads" and prospects assigned to him and as to the conduct of Second Party's services as broker hereunder, and as to the means of securing listings, handling prospects, and consummating deals, and shall be free from control of First Party as to the manner and method of conducting Second Party's services as real estate broker, it being the intent that Second Party is an independent contractor, and not a servant, employee, joint adventurer or partner of First Party.

(9) This agreement and the association created hereby may be terminated by either party hereto at any time upon notice given to the other.

Dated this day of, 19.....

HENRY BRODERICK INC.,

By

First Party

.....
 Second Party [39]

Admitted: Nov. 12, 1946. [39]

No. 432

Defendant Exhibit

AUTHORITY TO SELL REAL ESTATE

Nov. 12, 1946 A-1

Seattle, Washington, _____ 19__

FOR VALUABLE CONSIDERATION, and in further consideration of services rendered and to be rendered by Henry Broderick Inc., a Corporation, in negotiating for a sale of the property described on the reverse side hereof, the undersigned owner of said real property hereby grant to said Henry Broderick Inc. the exclusive right, for a period of _____ days, ending _____ 19__ to sell and enter into a contract for the sale of said property, purchase price to be \$ _____ terms of payment to be as follows: \$ _____ Cash; balance of \$ _____ payable as follows: _____

Owner represent that _____ he a good and marketable title to said real property and _____ agree upon the payment of earnest money deposit on the sale of said property, to furnish a title insurance policy, showing the said property to be free and clear of all encumbrances, excepting such as may be assumed by the purchaser (at purchaser's option) as a part of the aforesaid purchase price.

Rents, taxes, insurance and interest on encumbrances, if any, are to be adjusted as of date deed or contract is delivered. Said owner further agree that _____ will convey title to said property by statutory warranty deed to a purchaser to be indicated by Henry Broderick Inc., on the payment of purchase price as herein specified. Said owner hereby agree that in the event of a sale of said property by Henry Broderick Inc., or if Henry Broderick Inc. shall produce a purchaser ready, able and willing to purchase said real property on the terms above specified, during the life of this contract, or if the undersigned owner fail to perform any of the terms of this contract _____ will pay a commission of 5% of the purchase price. Time is of the essence of this agreement.

Henry Broderick INC

40

Main 4350

"An Office That Knows Its Subject"

District _____	LIST NO. _____
Address _____	PR _____
Owner _____	NO. ROOMS _____
Addition _____	AGE _____
Lot _____ Block _____ Size _____	ERECT SIGN _____
Style Construction _____	KEY AT _____
Bsmt. Rec. Rm. _____ Maid's Rm. _____ Bath _____	
Bed Rms.: 1st Flr. _____ 2nd Flr. _____ 3rd Flr. _____	
Baths: 1st Flr. _____ 2nd Flr. _____ Lav.: 1st Flr. _____	
Heat _____ Oil Bur. _____ Elec. Refrig. _____	
Floors _____ Garage: 1 car _____ 2 car _____ Bkfst. Rm. _____	
Condition _____ Finish _____ Taxes _____	
1st Mortgage, \$ _____ Rate _____ Held by _____	
Due _____ Reductions _____	
Contract Bal. _____ Payable _____	
Owner's Address _____ Phone, Res. _____	
Listed by _____ Date _____ Phone, Bus. _____	
REASON FOR SELLING _____	Appraisal _____

Baths _____ Beds _____

\$ _____

lg. 832
 Exh. A-2
 Nov. 12, 46

AUTHORITY TO SELL REAL ESTATE

Seattle, Washington, _____ 19__

FOR VALUABLE CONSIDERATION, and in further consideration of services rendered and to be rendered by Henry Broderick Inc., a Corporation, in negotiating for a sale of the property described on the reverse side hereof, the undersigned owner... of said real property hereby grant to said Henry Broderick Inc., the exclusive right, for a period of _____ days, ending _____ 19__ to sell and enter into a contract for the sale of said property, purchase price to be \$ _____ terms of payment to be as follows: \$ _____ Cash; balance of \$ _____ payable as follows: _____

Owner... represent that _____ ha a good and marketable title to said real property and _____ agree upon the payment of earnest money deposit on the sale of said property, to furnish a title insurance policy, showing the said property to be free and clear of all encumbrances, excepting such as may be assumed by the purchaser (at purchaser's option) as a part of the aforesaid purchase price.

Rents, taxes, insurance and interest on encumbrances, if any, are to be adjusted as of date deed or contract is delivered. Said owner... further agree that _____ will convey title to said property by statutory warranty deed to a purchaser to be indicated by Henry Broderick Inc., on the payment of purchase price as herein specified. Said owner hereby agree that in the event of a sale of said property by Henry Broderick Inc., or if Henry Broderick Inc. shall produce a purchaser ready, able and willing to purchase said real property on the terms above specified, during the life of this contract, or if the undersigned owner... fail... to perform any of the terms of this contract _____ will pay a commission of 10% of the purchase price. Time is of the essence of this agreement.

Henry Broderick INC.

"An Office That Knows Its Subject"

Main 4350

District.....	LIST NO.....
Address.....	PRICE.....
Owner.....	NO. ROOMS.....
Addition.....	AGE.....
Lot..... Block..... Size.....	ERECT SIGN.....
Style Construction.....	KEY AT.....
Bed Rms.: 1st Flr..... 2nd Flr..... 3rd Flr.....	
Baths: 1st Flr..... 2nd Flr..... Lav.: 1st Flr.....	
Heat..... Oil Bur..... Elec. Refrig.....	
Floors..... Garage: 1 car..... 2 car..... Bkfst. Rm.....	
Condition..... Finish..... Taxes.....	
1st Mortgage, \$..... Rate..... Held by.....	
Due..... Reductions.....	
Contract Bal..... Payable.....	
Owner's Address.....	Phone, Res.....
Listed by..... Date.....	Phone, Bus.....
REASON FOR SELLING.....	Appraisal.....
WILL TRADE FOR.....	

No.	BATHS	BEDS	\$
-----	-------	------	----

DEFENDANT'S EXHIBIT A-3

Henry Broderick, Inc. No. 832

Date.....

List No. Price.....

District

Address

Owner

Res. Phone Bus.

Bus. Address

No. Rooms Age

Style Construction

Size Lot Developed.....

Occ. by

Key at

Condition

Basement Rec. Rm..... Maid Rm..... Bath.....

Ex. Rooms 1st..... Bath.....

Bed Rooms 2nd..... Baths.....

3rd Floor Baths.....

Garage Floors.....

Heat Oil Bur.....

Int. Finish

Taxes If Paid.....

1st Mtg. Rate.....

Reductions

Mortgagee

Can we erect sign?

Listed by

Appraisal

Reason for sale

Comments

Admitted Nov. 12, 1946.

DEFENDANT'S EXHIBIT A-4

Henry Broderick, Inc. No. 832

Exclusive Listing

From To
 Price
 District
 Address
 Owner
 Res. Phone Bus.
 Bus. Address
 No. Rooms Age
 Style Construction
 Size Lot Developed.....
 Occ. by
 Key at
 Condition
 Basement Rec. Rm.....Maid Rm.....Bath.....
 Ex. Rooms 1st..... Bath.....
 Bed Rooms 2nd..... Baths.....
 3rd Floor Baths.....
 Garage Floors.....
 Heat Oil Bur.....
 Int. Finish
 Taxes If Paid.....
 1st Mtg. Rate.....
 Reductions
 Mortgagee
 Can we erect sign?
 Listed by
 Appraisal
 Reason for sale
 Comments

Admitted Nov. 12, 1946. [43]

DEFENDANT'S EXHIBIT A-5

Earnest Money Receipt

Henry Broderick, Inc.

No. 832

Seattle, Washington,....., 19...

Received from.....(hereinafter called "purchaser").....Dollars (\$.....) as earnest money in part payment of the purchase price of the following described real estate in King County, Washington:

Total purchase price is.....Dollars (\$.....), payable as follows:

Owner shall furnish purchaser, as soon as procurable and within.....days of date of acceptance of this offer, purchaser's policy of title insurance or title report evidencing condition of title.

If title is not insurable and cannot be made insurable within.....days from date of title report, earnest money shall be refunded and all rights of purchaser terminated, except that purchaser may waive defects and elect to purchase. But if title is good and purchaser neglects or refuses to complete purchase, the seller shall forfeit the earnest money as liquidated damages which shall be the exclusive remedy of the seller under this contract. The agent shall not be responsible for delivery of title.

The property is to be conveyed by.....deed, free of encumbrances except

Rights reserved in federal patents or state deeds, building or use restrictions general to the district, and building or zoning regulations and provisions shall not be deemed encumbrances.

Encumbrances to be discharged by owner may be paid out of purchase money at date of closing.

194.... general taxes shall be adjusted on pro rata calendar basis, seller to pay for period from January 1st, 194.... to date of closing, purchaser from date of closing to December 31st, 194.....

Rents, insurance, interest and water shall be prorated as of date of closing.

Possession

Purchaser offers to purchase the property on the terms noted and this agreement is issued subject to the approval of the owner thereof within..... days from date. Purchaser agrees not to withdraw this offer during said period or until earlier rejection thereof by owner. Purchaser agrees that written notice of acceptance, given to agent by owner, shall be notice to purchaser.

The sale shall be closed in office of agent withindays after title insurance policy or title insurance company's report is furnished by owner.

There are no verbal or other agreements which modify or affect this contract.

Time is of the essence of this contract.

.....
Seller.

Seller (wife or husband).

Agent.

Purchaser.

Purchaser (wife or husband)

A citizen or one who has in good faith declared his intention to become a citizen of the United States.

Address and Phone.

Seattle, Washington,....., 194....

I Hereby Agree to the above sale and to all the foregoing terms and conditions and agree to pay Henry Broderick, Inc., agent, when the sale is concluded, commission of \$..... for services.

In the event that the deposit is forfeited, I agree to pay one-half of the amount forfeited to said agent.

Address

Phone

Owner.

Wife. [44]

Earnest Money Receipt

From

To

Date

Property

Closed

Date

Remarks

HENRY BRODERICK, INC.,
Second and Cherry
MAin 4350. [45]

[Earnest Money Receipt identical with Earnest Money Contract except the word "Receipt" appears instead of "Contract" in the two headings.]

DEFENDANT'S EXHIBIT A-6

No. 832

Authority to Sell Real Estate

Seattle, Washington,, 19....

For Valuable Consideration, and in further consideration of services rendered and to be rendered by Henry Broderick, Inc., a Corporation, in negotiating for a sale of the following described real estate situated in Seattle, King County, State of Washington, to-wit:

the undersigned owner... of said real property hereby grant... to said Henry Broderick, Inc., the exclusive right, for a period of.....days, ending, 19..., to negotiate a contract for the sale of said property, purchase price to beDollars; terms of payment to be as follows: \$.....Cash; balance of \$..... to be evidenced by:

Owner... represent... that ha..... a good and marketable title to said real property and..... agree... upon the payment of earnest money deposit on the sale of said property, to furnish a purchaser's policy of title insurance insuring the said property to be free and clear of all encumbrances, excepting such as may be assumed by the purchaser (at purchaser's option, as a part of the aforesaid purchase price.

Taxes for the current year, rents, water, insurance and interest on encumbrances, if any, are to be adjusted as of date deed or contract is delivered.

Said owner.... further agree.... that will convey title to said property by statutory warranty deed to a purchaser to be indicated by Henry Broderick Inc. on the payment of purchase price as herein specified.

Said owner.... hereby agree.... that in the event of a sale of said property by Henry Broderick Inc. or if Henry Broderick Inc. shall produce a purchaser ready, able and willing to purchase said real property on the terms above specified, or if the undersigned owner.... fail.... to perform any of the terms of this contract.....will pay a commission of 5% on the first \$60,000.00 of the purchase price, and 2½% on the balance of the purchase price.

Time is the essence of this agreement.

.....
“An Office that Knows Its Subject”

Henry Broderick Inc.

Second and Cherry—MAin 4350

Seattle 4, Washington

Admitted Nov. 12, 1946. [48]

No. 832
Deft's Exhibit A-7
Adm. Nov. 12, 1946



MELVILLE WILSON

BUSINESS PROPERTIES

Henry Burdick Inc.

MAIN 4350

SECOND AND CHERRY

SEATTLE



FRED J. O'BRIEN

SECRETARY

Henry Burdick Inc.

MAIN 4350

SECOND AND CHERRY

SEATTLE



M. ROSS DOWNS

ASSOCIATE BROKER

Henry Burdick Inc.

MAIN 4350

SECOND AND CHERRY

SEATTLE

(Per Order dated March 24, 1947 identification of exhibit heretofore marked as Pltf's #2, corrected and marked as Deft's Exh. A-7)

In the United States District Court for the
Western District of Washington

Southern Division

No. 832

BRODERICK, INC.,

Plaintiff,

vs.

CLARK SQUIRE, individually and as Collec-
tor of Internal Revenue for the District of
Washington,

Defendant.

CLERK'S CERTIFICATE TO THE
TRANSCRIPT OF THE RECORD ON APPEAL

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foregoing transcript, consisting of pages numbered 1 to 49, inclusive, together with the original Transcript of Proceedings, consisting of pages numbered 1 to 114, inclusive, is a full, true and correct record of so much of the papers and proceedings in Cause No. 832, Henry Broderick, Inc., Plaintiff-Appellant, vs. Clark Squire, individually and as Collector of Internal Revenue for the District of Washington, Defendant-Appellee, as required by Plaintiff's Amended Designation of the Contents of the Record on Appeal and Defendant's Designation of Additional Contents of the Record on Appeal, on file

and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Judgment of the District Court of the United States, Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the original Reporter's Transcript of Proceedings, consisting of pages numbered 1 to 114, inclusive, is herewith transmitted to the Circuit Court of Appeals.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, to-wit:

Appeal fee	\$ 5.00
Clerk's fee for preparing, comparing and certifying record on appeal	10.40
	\$15.40

and I further certify that the said fees, as above set out, have been paid in full.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 19th day of April, 1947.

[Seal]

MILLARD P. THOMAS,
Clerk.

By /s/ E. E. REDMAYNE,
Deputy.

In the District Court of the United States for the
Western District of Washington
Southern Division

No. 832

HENRY BRODERICK, INC.,

Plaintiff,

vs.

CLARK SQUIRE, individually and as Collec-
tor of Internal Revenue for the District of
Washington,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 12th day of November, 1946, at the hour of 10:00 o'clock a. m., the above entitled and numbered cause came on for trial before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States at Tacoma, Pierce County, Washington; the Plaintiff appearing by Messrs. Eggerman, Rosling & Williams (by Mr. Eggerman), and the Defendant appearing by J. Charles Dennis, United States Attorney, Harry Sager, Assistant United States Attorney, and Thomas R. Winter, Special Assistant to Chief Counsel (by Mr. Winter).

Whereupon, the following proceedings were had and done, to-wit: [2*]

(Whereupon opening statement was made by Mr. Eggerman.)

Mr. Eggerman: If the Court please, I have shown the Corporation License receipt to Counsel for the defendant, showing that the plaintiff is licensed under the State till June 30, 1947, and he admits that that is the fact, so that's no issue.

The Court: Very well. [14]

LLOYD T. BAIRD,

produced as a witness on behalf of the plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. State your name to the Court, Mr. Baird?

A. Lloyd T. Baird.

Q. And do you reside in Seattle?

A. I do.

Q. What is your official connection, if any, with the plaintiff firm? A. I am Vice President.

Q. How long have you been Vice President?

A. About five years.

Q. And how long have you been connected with the firm?

A. A little more than nineteen years.

Q. By the way, Mr. Henry Broderick is the President, is he not? A. That's correct.

Q. And is it not a fact that about ten days ago he was suddenly stricken and taken to the hospital?

A. Yes, sir.

(Testimony of Lloyd T. Baird.)

Q. Where he is still confined?

A. He is still in the hospital, yes, sir.

Q. And he is unavailable today? [15]

A. That's correct.

Q. In what business is the plaintiff firm engaged?

A. Real estate, property management and insurance.

Q. How long has the plaintiff been in existence as a Corporation? And engaged—

A. Since 1911. Pardon?

Q. And engaged in that business?

A. Since 1911.

Q. Tell us whether or not the plaintiff is licensed as a broker under the laws of the State of Washington? A. It is.

Q. A Real Estate broker, I should say?

A. It is.

Q. Now, can you outline in a little more detail, your duties?

A. Well, in addition to the usual duties of a Vice President, which has to do with general supervision of the office, under the President, having been Manager of the Property Management department for so many years, the larger part of my attention is directed toward the Property Management department.

Q. And as such, what are your duties with reference to giving instructions to employees?

A. Mr. Foster is the General Rental Manager, over who I am, and through him instructions are given to the employees. [16]

(Testimony of Lloyd T. Baird.)

Q. How many real estate salesmen employees does the plaintiff employ?

A. We have eleven or twelve.

Q. And do they also carry licenses?

A. They do.

Q. Real estate licenses? A. Yes, sir.

Q. What kind of licenses do they carry?

A. Salesmen's licenses.

Q. And is there a bond furnished by these salesmen to the State of Washington?

A. There is a bond furnished to the State of Washington.

Q. And who pays the cost of that?

A. The firm.

Q. And who pays the expense of procuring their licenses—who pays the premiums on their bonds?

A. The firm, also.

Q. Now, by that you mean the plaintiff?

A. That's right.

Q. Tell us whether or not there are sales meetings conducted in the plaintiff's office, attended by these salesmen employees? A. There are.

Q. How regularly and how frequently?

A. Every business morning. [17]

Q. Tell us whether it is optional or compulsory upon the salesmen employees to attend those meetings? A. Compulsory.

Q. Who presides at those meetings?

A. Mr. Foster, the rental manager.

Q. And what, in general, is done at those meetings?

(Testimony of Lloyd T. Baird.)

A. The salesmen report on the assignments that they have been given for the day before, the activities of the day before, and generally give a report to Mr. Foster of all they have done the day previous. Also assignments are given to the salesmen, by the head of the department, for the ensuing day.

Q. Will you tell us, what, if any——

Mr. Winter: Mr. Eggerman, are those contracts with the salesmen in writing, or——

Mr. Eggerman: No, we have no contracts in writing with the salesmen. How far had I gone in my question, Mr. Reporter?

The Reporter (reading): “Will you tell us what, if any——”

Q. Will you tell us what, if any, supervision or control is exercised by the plaintiff over these salesmen employees?

A. They have complete supervision as they would over any employee, clerk or otherwise. [18]

Q. Are they required to keep regular hours?

A. They are.

Q. Just what are those hours?

A. The office opens at 8:30 in the morning and the closing hour is 5 in the evening.

Q. Now, when any work is assigned to them, what, if any requirement is there that they make prompt reports of what they have done on the assignment?

A. They are required to make a prompt report.

Q. Now, with reference to these salesmen employees, do they devote, or are they permitted to

(Testimony of Lloyd T. Baird.)

devote any portion of their time to efforts to make sales of real estate?

A. They are employed on a basis which requires that they give all of the time necessary to Property Management account, under their particular charge. They are allowed, in addition to that, if they have fulfilled their duties in regard to the office Property Management account, to make sales, and, also, I might say, to make leases, that is property management leases.

Q. What percentage of their time has been devoted to those assignments, making sales and making leases?

A. Approximately twenty-five per cent.

Q. Now, with reference to their sales or lease activities, what directions if any, or controls if any, is exercised by [19] them with reference to specific assignments?

A. Entire control.

Q. Who gives them the assignments and tells them what sales to attend to; or leases to attend to?

A. Mr. Foster.

Q. Now, when they are given a prospect, what instructions do they receive with respect to seeing that prospect, and making a report?

A. They are instructed to see the prospect and report back to the head of the department as to what transpired.

Q. What is the basis of compensation to these salesmen employees?

A. They have a regular stipulated salary.

Q. And how often is that paid?

A. That's paid twice a month.

(Testimony of Lloyd T. Baird.)

Q. Now, if they should be—or any of them should be successful in making a sale, or a lease on which a commission comes to the firm, do they receive any compensation therefrom, for that?

A. They do.

Q. And what is that?

A. It's about—equivalent to about forty per cent of the commission earned by the office.

Q. And when is that paid to them?

A. That is paid on the regular salary day.

Q. So that if they were responsible for a commission earned [20] by Henry Broderick, Inc., on the 2nd of the month, they wouldn't receive the bonus until when?

A. Till the fourteenth, or fifteenth.

Q. And in the meantime, when that comp—when that commission was paid, where did it go—where would it go?

A. It goes into Henry Broderick, Inc., profit and loss account.

Q. Now are these salesmen employees required to pay any part of the sales expense in endeavoring to make sales or leases? A. They are not.

Q. Who pays that? A. The firm.

Q. Now, if they are unable to effect a sale, does that affect their salary in any way?

A. It doesn't.

Q. Mr. Baird, I now hand you——

The Court: Hand the exhibits to the Bailiff, and the Bailiff will hand them to the witness.

Q. You have before you a document marked Exhibit 1. Tell the Court what that is?

(Testimony of Lloyd T. Baird.)

A. That's an agreement between Henry Broderick, Inc., as Brokers. [21]

Q. Is that a specimen, a blank?

A. This is a blank specimen.

Q. Are you familiar with that form?

The Court: If you will just let the Bailiff—

Mr. Eggerman: I beg your pardon, I am so used to the Superior Court procedure.

Q. You are familiar with this form, are you?

A. I am, yes, sir.

Q. With what associates is this form used?

A. Brokers.

Q. And the brokers that are associated with Henry Broderick, Inc., tell us whether those now associated have all signed a contract similar to this specimen? A. They have.

Mr. Eggerman: We offer this in evidence.

The Court: It's the same as the one attached to the complaint?

Mr. Eggerman: Yes, sir.

Mr. Winter: May I see it, your Honor? Is this form of plaintiff—when was this form of plaintiff first used?

Mr. Eggerman: I believe in 1937 or '38.

Mr. Winter: Before that you didn't have any written agreement? [22]

The Witness: No, sir.

Mr. Eggerman: I was coming to that.

Mr. Winter: And this was used during all the period here involved,—1943, '44 and '45?

The Witness: Yes, sir.

(Testimony of Lloyd T. Baird.)

The Court: I think I shall—it will be admitted in evidence.

(Whereupon, Agreement referred to was then received in evidence, and marked Plaintiff's Exhibit 1.)

[Plaintiff's Exhibit 1 set out on pages 43 to 47.]

Q. You were, of course, associated with the firm as an officer and employee prior to 1937 and 1938?

A. Yes, sir.

Q. Counsel has asked you whether there was any written contract in effect between the plaintiff and the brokers associated with it prior to that date. Was there any difference between the oral agreement and understanding between the brokers associated with the plaintiff firm prior to the formulation of this contract, that is evidenced by the contract itself?

A. No, sir.

Q. Tell us whether or not your firm engaged herein has or has not had similar relationships with other [23] real estate firms in the City of Seattle, independent firms like John Davis——

Mr. Winter: If the Court please, we object to that, as calling for a conclusion of the witness. I think he might confine his questions——

Mr. Eggerman: Well, if the Court please——

Mr. Winter: To the period here involved. I don't think it is going to help us any——

Mr. Eggerman: I will withdraw the question.

(Testimony of Lloyd T. Baird.)

Q. Where is most of the work that these brokers do, where is it done? A. In the field.

Q. Why is that so?

A. The very type of work requires that the properties must be shown, contracts must be made, clients must be interviewed, which in most cases, I would say, would be outside of the office.

Q. Now, who, if anyone, in the plaintiff firm, tells the broker how he should proceed in an effort to make a real estate sale or a lease?

A. No one does.

Q. Who determines the strategy and the procedure that shall be used by the individual broker in those cases? A. The broker, himself.

Q. Does your firm require the broker to observe any hour—— [24]

Mr. Winter: If the Court please, the plaintiff here can have a written agreement; that's the best evidence of what is required.

The Court: I think I shall let him answer the question as to the method they have. I think probably it would be well not to lead the witness too much.

Mr. Eggerman: Very well. Read the question, Mr. Reporter.

The Reporter: The question is (reading): "Does your firm require the broker to observe any hour——"

The Witness: It does not.

Q. Now tell us, when the broker has obtained an earnest money deposit, tell us what is done with that?

(Testimony of Lloyd T. Baird.)

A. The earnest money deposit is turned in to our escrow department.

Q. And where is it placed—under what heading on the books?

A. It is placed under a heading of Buyer and Seller.

Q. Giving the names of the buyer and seller?

A. That's correct.

Q. Now when, if ever, does the commission emanate from that escrow account bearing the name of buyer and seller?

A. I will have to have you repeat that, please.

Q. When does the commission emanate, or is taken out of that account?

A. At the final conclusion of the deal.

Q. Prior to that time what, if any, commission has Henry Broderick, Inc., or the broker received?

A. None.

Q. When that account is ready to close, what is done with the amount in the account that represents the amount of the commission earned?

A. One-half, or approximately one-half is turned over to the broker, and the other one-half is turned in to the firm's profit and loss account.

Q. Prior to that time, has any money from that particular transaction entered the profit and loss account of Henry Broderick, Inc.?

A. None whatsoever.

The Court: May I interrupt here just to ask you, suppose a prospective buyer makes a down payment and then subsequently abandons the deal and

(Testimony of Lloyd T. Baird.)

there is a forfeiture of his down payment, you have instances of that kind?

The Witness: Yes, we do, your Honor.

The Court: What do you do then?

The Witness: Normally, the money would be returned to the seller, with the exception of a [26] stipulated amount, which is provided for, I believe, in our Earnest Money contract, provides in case of forfeiture up to a certain amount shall be divided between the seller and the broker.

The Court: Well, does the plaintiff in this action get anything out of that matter at all—

The Witness: The plaintiff in this action would get—Mr. Enge can tell you better than this, or Mr. O'Brien, but I believe it is one-half.

The Court: It would be the same as earned commission?

The Witness: That's correct.

Mr. Eggerman: And would the broker receive any portion of it?

The Witness: The broker would receive his one-half, or approximately one-half.

Q. Now, I don't think I have asked you this question. I asked you about meetings of the employee salesmen? A. Yes, sir.

Q. Do you also have meetings of—at which the brokers are privileged to attend? A. We do.

Q. And are they required to attend those meetings? [27] A. They're not.

Mr. Eggerman: I believe that's all.

(Testimony of Lloyd T. Baird.)

Cross-Examination

By Mr. Winter:

Q. Mr. Baird, supposing a real estate salesman, an employee sells a piece of property and gets an earnest money receipt, what do you do with that earnest money; doesn't that go in to an escrow account?

A. Those go into the same account; yes, sir.

Q. And then when the deal is finally consummated, at the end of the month of the pay period, the salesman would get 40% and Mr.—and 40% goes into the profit and loss account of Broderick, Inc., 60% goes into the profit and loss account?

A. Not exactly like that, Mr. Winter. Immediately on the close of the sale, the office's proportion would go into the office's profit and loss account, the salesman does not receive his forty per cent until pay day.

Q. And of course the real estate—what you call the real estate broker they get 50% usually as commission, don't they? A. That's about it. [28]

Q. And they pay their own expenses?

A. That's correct.

Q. The salesman he gets 40% but the company pays his expenses? A. Correct.

Q. Do you figure it costs the salesman—costs the company approximately 10% of the sales for the expenses which you furnish for them?

A. I don't believe they're arrived at on that

(Testimony of Lloyd T. Baird.)

basis. We have felt that the man who is employed and paid for a specific purpose, was not entitled to——

Q. What per cent of your sales were made by brokers and what percentage by salesmen?

A. I'm afraid either Mr. O'Brien or Mr. Enge will have to answer that, Mr. Winter.

Q. And I understand it that these salesmen and property managers, they are required to spend all of their time, or as much as necessary, on property management? A. Correct.

Q. Now, do you have a Property Management Department? A. Yes, sir.

Q. You have a Real Estate Department?

A. Yes, sir.

Q. And you have a——

A. Insurance. [29]

Q. Insurance Department? They are the three departments? A. Yes, sir.

Q. Who is in charge of the Real Estate Department? A. Fred O'Brien.

Q. Mr.—who? A. Mr. Fred O'Brien.

Q. And is the Real Estate Department separated from the Insurance Department and the other departments?

A. It's a separate department, yes, sir.

Q. Well, I mean is it a separate room?

A. It's an entirely separate room from the insurance and the rental departments.

Q. And has a big sign over the entrance "Real Estate"?

(Testimony of Lloyd T. Baird.)

A. Over the entrance to that department, yes.

Q. To that department, and all of the men who sell real estate, both the brokers and the salesmen, have an office in that—I mean have a desk—or office space in that department. Is that true?

A. No, sir. The brokers have a desk in that department, but the salesmen have their—the salesmen in the property management department are in the Property Management department.

Q. Then you don't have—admit employees in the Real Estate Department office having offices, is that true?

A. Well, I believe we have one employee. [30]

Q. There's no salesmen that sell real estate?

A. No.

Q. Those are all brokers in there, aren't they?

A. They are all brokers, with the exception of one man, as I recall, who has to do with residential sales.

Q. And he is a salesman?

A. I believe he has a sales office.

Q. A full time man? A. Yes, sir.

Q. Who secures the listings from the Henry Broderick & Co.

A. Some come directly from—to the office through advertising; the brokers secure some themselves.

Q. Well, if the brokers secure a listing, is it then turned over into the Company's file and termed a listing with the Company? A. Yes, sir.

Q. And is a broker or salesman privileged to

(Testimony of Lloyd T. Baird.)

take any of the listings in the company's files?

Mr. Eggerman: Will Counsel repeat that question?

The Witness: Pardon?

The Reporter (Reading): And is a broker or salesman privileged to take any of the listings in the Company's files?

The Witness: Well, I think he can answer that fairly well. This all comes under Mr. O'Brien's department, [31] Mr. Winter, but—I would say generally—say yes.

Q. You're the property Manager?

A. Well, I am vice president and familiar generally with the entire office, although Mr. O'Brien would be able to answer more specifically the questions directed toward the Real Estate Department.

Q. Well, do the real estate brokers handle rentals for your department?

A. They don't handle any property management; they sometimes make a lease.

Q. And then they bring it into your department and it is handled there, is it?

A. The lease is made by a broker; it becomes a—to which a commission is attached. Then I believe, as I understand it, he is paid or he participates in the same manner in which he participates in the real estate sale.

Q. After—when the earnest money is received that is deposited in the account of Henry Broderick & Co.

(Testimony of Lloyd T. Baird.)

A. When the earnest money is received?

Q. Yes?

A. The—the funds you are referring to?

Q. Yes.

A. The funds as to—how they are deposited or how they are on our books, which is your question? [32]

Q. Well, how are they deposited—deposited in an escrow account belonging to the company?

A. They are deposited in the Company account.

Q. And then the Company's check is given to the salesman after the deal is completed?

A. That's correct.

Q. You don't have any contracts with such brokerage companies like John Davis & Company, do you? A. No, we don't.

Q. Nor with any other recognized brokerage company that has an office? A. No, sir.

Q. The only brokers that you have contact with are those that you furnish desk space, telephone service, and all those other things under your contract?

A. Those brokers associated with us, yes, sir.

Q. You have a broker's license yourself, don't you? A. I do, yes, sir.

Q. And yet you are vice president, and work for the plaintiff corporation?

A. That's correct.

Q. The only one that don't have a broker's license are those salesmen that are in the property management department?

(Testimony of Lloyd T. Baird.)

A. That, I believe, is it, with the exception I mentioned [33] that has to do with residential sales.

Q. Yes. You sell real estate for Henry Broderick & Co.?

A. No, sir.

Q. Don't you? Did you ever sell any for them during the past?

A. I have cooperated in sales, yes, sir, but I don't—

Q. You don't get any independent commissions?

A. No, sir.

Q. That all goes to Henry Broderick & Co.?

A. It goes into the corporate fund, yes, sir.

Q. And in those sales in which you have participated, that all those funds go into an escrow account until the deal is finally consummated, and then the check is made to Henry Broderick & Company, and goes into its profit and loss account, is that right?

A. Any sale that I might have anything to do with, my position in that sale is simply in the way of cooperating, and the commission is handled just as any other commission.

Q. It doesn't go to the profit and loss account until after the sale is completed?

A. No.

Q. All of these real estate men—real estate salesmen who have been employed by Henry Broderick & Company [34] have been on a salary basis, is that right?

A. The salesmen?

Q. Yes.

A. Yes, sir.

Q. And that is because of the nature of the business, is it, the reason you have to put them on a salary?

(Testimony of Lloyd T. Baird.)

A. Because they have specific obligations and duties to perform for the office and the office clients.

Mr. Winter: That's all.

Redirect Examination

By Mr. Eggerman:

Q. You are likewise an officer and stockholder with the plaintiff, are you not? A. Yes, sir.

Q. Now, I understand that these listings are available to all the brokers? Is that right?

A. Yes, sir.

Q. But in the case of the salesmen, is that true? Or are they assigned, by the firm, to certain prospects?

A. I would say as to salesmen primarily, their sales are assigned to them. However, I believe that they could look at the file.

Q. Now, one other question. Regardless of whether a deal [35] is handled by a real estate salesman or a real estate broker, until that deal is closed, it always goes through an escrow account, does it not? A. That's correct.

Q. Now explain, in view of Counsel's question, the difference between the transaction where it's handled by a salesman, or initiated by a salesman, and where it's initiated by a broker, when that escrow account is ready to be closed and the commission is assured.

A. Well, in the case of a broker, the commission is—as soon as the deal is closed, the broker's

(Testimony of Lloyd T. Baird.)

portion of the commission is immediately paid to him, and the firm's portion goes into an escrow account—I mean into a profit and loss account. In the case of a salesman, the same applies as far as the firm's funds are concerned, it goes immediately into profit and loss, but the salesman does not receive his until his pay day.

Q. In other words, all the commission goes into the plaintiff's profit and loss account in the case of a salesman's transaction?

A. That's correct.

Q. And then later the salesman receives a bonus paid by the firm with his salary?

A. With his regular salary check, yes, sir. [36]

Mr. Eggerman: I believe that is all.

The Court: I want to ask you one or two questions. When a listing of property is taken from the owner, is it taken on a form that the Company has?

The Witness: If it is an exclusive listing, your Honor, we have a form for exclusive listings, which is an office form. An open listing, very seldom is put—is on a form, but we do have a card form for it.

The Court: Well, is that card form the broker's individual card, or is the exclusive listing the broker's individual—

The Witness: Neither one—both on office forms.

The Court: Now, could one of these brokers,—by the way you have enumerated them in this complaint over the three years that are here involved, for the purpose of my question let us take S. R.

(Testimony of Lloyd T. Baird.)

Holcombe, his name appears in at least two of the three years here involved, could he go to some other firm if he saw fit and sell for them as well as for you? [37]

The Witness: Could he, as far as we are concerned?

The Court: And does he, or is that the practice at all?

The Witness: I don't believe it would just in that way. He might very often sell a property that was listed for another firm. For instance, John Davis & Company might have a property listed which Mr. Holcombe might sell.

The Court: If they had an exclusive listing, you would say?

The Witness: Either exclusive or sometimes if they had an open listing.

The Court: But if they had an exclusive listing?

The Witness: Then he would have to work for them.

The Court: Well, but do they do that?

The Witness: Pardon?

The Court: Does that practice prevail?

The Witness: Quite often, yes, sir.

The Court: And then the commissions are divided usually on fifty-fifty basis in that kind of a transaction?

The Witness: Usually the commission is [38] divided fifty per cent to each office, insofar as the—for instance in this case supposing that West and Wheeler, the commission were a thousand dollars,

(Testimony of Lloyd T. Baird.)

West and Wheeler would receive five hundred dollars as a rule, then five hundred dollars would go into our escrow account until it was closed, and then the broker would receive his one-half immediately on the closing and confirmation of the deal and the other would go into the firm's profit and loss.

The Court: Well, then he wouldn't be free to handle it independent of your—of your company then?

The Witness: Without—without——

The Court: Without accounting for——

The Witness: No, sir, he wouldn't.

The Court: Now, I assume, but I think to make sure I think I will ask a question; when a sale is made and then there are certain details that are necessary, the papers prepared, the conveyances and then title insurance as a rule, and is that all ordered by the broker, that is, the title insurance, or is that ordered by someone in your firm?

The Witness: We have a man who is in charge of escrow department who is very often, and I would say probably in a majority of cases, order it, but very often the brokers order their own. [39]

The Court: And who is billed for it?

The Witness: The bill would come to Henry Broderick, Inc.

The Court: And then they pay for it and charge it back to the client?

The Witness: It would come out of that escrow fund.

The Court: I think that is all that I have in mind.

Mr. Eggerman: May I ask one question in re-direct, your Honor, before you adjourn?

The Court: Yes.

Mr. Eggerman: With reference to listings, does it—state whether or not it does occasionally happen that a broker obtains a listing and enters into a contract of—or gets an earnest money receipt before that listing ever gets into the firm?

Mr. Winter: Oh, that is leading, if the Court please.

The Court: Oh, he may answer it.

The Witness: That happens, yes, sir.

Mr. Eggerman: That's all.

The Court: I think we will take an adjournment now till 2:00 o'clock this afternoon.

(Recess.) [40]

November 12, 1946

2:00 o'Clock P.M.

FRED J. O'BRIEN

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. What is your name, Mr. O'Brien?

A. Fred J. O'Brien.

(Testimony of Fred J. O'Brien.)

Q. What is your official connection with the firm of Henry Broderick, Inc.?

A. Secretary.

Q. How long have you been associated with that firm? A. Approximately five years.

Q. What are your duties in general?

A. In addition to those duties generally exercised by a Secretary, I am Manager of the Real Estate Department.

Q. And as Manager of the Real Estate Department, what are your particular activities?

A. To discuss with the associate brokers at meetings in the morning, real estate activities in the City of Seattle, new listings that are brought in, and general discussion regarding real estate activities by the men. [41]

Q. These meetings that you refer to, are they optional or compulsory, sir, so far as—

A. They are optional, Mr. Eggerman.

Q. How many brokers are so associated with the firm at this time in all?

A. About eighteen or nineteen; it changes from time to time; but I checked the list this morning; it was nineteen.

Q. Tell us, if you know, whether any of these brokers before becoming associated with the firm were engaged, themselves, in the real estate business? A. Yes, sir.

Q. And do you know whether or not some of them have been so engaged for a long period of time before becoming so associated with you?

(Testimony of Fred J. O'Brien.)

A. Yes, they have. Many of them have been in the business for many years before coming to us.

Q. What type of license do these brokers carry?

A. Real Estate Brokers License.

Q. And who makes application for those licenses? A. The broker.

Q. And who pays the expense?

A. The broker.

Q. Who furnishes the bond?

A. The broker.

Q. And such other state taxes as are required to be paid, [42] who pays those?

A. The broker.

Q. What—with reference—I will withdraw that. Some of these, or nearly all of these brokers own their own cars? A. Yes, sir.

Q. Who takes care of the upkeep and the gasoline and the general expense?

A. The brokers take care of their own cars.

Q. And the insurance, if any, on their cars?

A. Their insurance, also.

Q. Since you have been associated with the firm, tell the Court, who, generally, interviews such prospects as apply to become associated brokers with your firm?

A. I do that interviewing now, Mr. Eggerman.

Q. Who did it before?

A. Mr. Broderick.

Q. And what do you seek to ascertain in these interviews with these prospective brokers?

A. The first thing I seek to ascertain is whether

(Testimony of Fred J. O'Brien.)

they have a Real Estate Brokers License. If they have a Real Estate Broker's License, then I discuss their qualifications, and also their financial conditions. I do that because the men work on——

Mr. Winter: We don't want his conclusions. [43]

Mr. Eggerman: I will ask you the reason why you are interested in the financial condition of these prospects as associated brokers?

A. Because the men are not advanced any money and the only remuneration they have is from the commissions that they earn from sales, and it has been our experience that if a man is not financially able to carry on his livelihood he does not prove to be a very good associate broker.

Q. Now, it already appears that the firm has, what we call, listings in the office. From what sources are those listings made up of?

A. Most of the listings come to the firm because of our reputation; many of them are turned into the firm by the brokers; many of them are obtained from real estate ads.

Q. Tell us whether or not those listings are available to all brokers? A. They are.

Q. What, if any, supervision do you exercise over these brokers, either as to what listings they will work on; what prospects they may try to see, or the strategy of their work?

A. I exercise no supervision over the brokers.

Q. Does any one in the firm attempt to do so?

A. No, sir. [44]

Q. Referring again to these listings, are there

(Testimony of Fred J. O'Brien.)

any instances where a broker may obtain a listing and close an earnest money deal before the listing ever gets to your office?

A. That has happened.

Q. Tell us whether or not there are any specific hours required of these brokers? A. No, sir.

Q. Is there a variation in the amount of time that the individual broker may give to the real estate business?

Mr. Winter: Now, isn't that a matter of construction of the contract, if the Court please? The contract is the best evidence. If the contract is in writing, then the contract is the best evidence.

Mr. Eggerman: I am not asking about the contents of the contract. I am asking what they do, how much time they put in.

The Court: He may answer.

A. The broker puts as much time as he desires into his work.

Q. And is there any variety as to the amount of time one broker may put in as compared to another?

A. Yes.

Q. Can you give us any illustrations of any brokers [45] who have other activities besides the real estate business to which they devote time?

A. Yes, I can give you two examples. One is an associate broker, Mr. Wilson. He is engaged in the food brokerage business with a firm, and another is an associate broker by the name of Jack Stewart, who owns and operates the Parker House part of the time.

Q. Can you think of any other illustration?

(Testimony of Fred J. O'Brien.)

A. I don't think of any other just now.

Q. How about Mr. Robbins?

A. Mr. Robbins, of course, has outside activities; for instance he is Chairman of the Board of the Seattle Pacific College, that work takes some of his time, and he devotes time to that and other things that I'm not familiar with.

Q. Can you tell us anything about an associate broker by the name of Mr. Flemming?

A. Yes, sir.

Q. Just briefly?

A. Several years ago Mr. Flemming had a—discovered that he had a damaged heart, and his doctor requested that he devote only a small time—a small, few hours a day to his work, and for the last couple or three years, maybe four years now, I don't think Mr. Flemming has worked more than one or two hours a day. [46]

Q. How about Mrs. McKenzie?

A. Mrs. McKenzie works on residential property; she lives in the suburbs; she gets to the office probably once a week.

Q. In other words, who determines the amount of time any broker will devote to the real estate activities? A. The broker.

Q. Is there any limitation on the field of the broker's activity. I mean, in any area that he is limited to, or excluded from? A. No, sir.

Q. Any limitation upon the character of the property in which he may transact his business?

A. No, sir.

(Testimony of Fred J. O'Brien.)

Q. Who determines the character of property, or the area, if there is a preference?

A. The broker, himself.

Q. In the advertising, whose name frequently appears in the advertising that is run by your firm?

A. In most every case the broker's name appears and also his residential telephone number.

Q. Is any part of this advertising expense, where the residence telephone number is listed for the broker, paid for by the broker?

A. No, sir. [47]

Q. Tell us whether or not some of their work then is transacted from their residence?

A. A great deal of their work is transacted from their homes.

Q. Now, if a broker's name appears on a specific advertisement, in connection with a given piece of property, does that preclude another broker, if he finds a prospect and wants to sell that property, from selling it? A. It does not.

Q. Now, have these brokers any specific hours that they are required to be in the office of the firm?

A. They do not.

Q. Any routine laid down that they have to follow? A. No, sir.

Q. Any specific calls that they are required to make by the firm? A. No, sir.

Q. Tell us whether or not there is any objection on the part of the plaintiff to a broker having other activities than the real estate business, such as the food business? A. No, sir.

(Testimony of Fred J. O'Brien.)

Q. Now if a broker has been unable, over a period of time, to affect any sales or leases, as a result of which no commissions have been earned, does he receive any [48] compensation from Henry Broderick in any form? A. He does not.

Q. Where is most of the productive work done by the broker?

A. Most of the productive work is done in the field.

Q. Why is that so?

A. It is necessary to contact the prospective purchasers or owners at the place of business, and it's necessary to inspect the property, and generally speaking, the more effective work can be done outside the office.

Q. Where are the earnest money receipts signed?

A. I think most of the earnest money receipts are signed in the purchaser's home, or place of business.

Q. Where are the closing details of the transaction frequently worked out?

A. Well, they are worked out either in an attorney's office, in an Escrow Company or in our office.

Q. Now, who determines the mode of approach, the method of handling, the efforts to make a successful real estate sale or lease—your firm or the broker? A. The broker.

Q. Do you make any effort to control that?

A. No, sir.

Q. Now, for the purpose of clarifying the record [49] I remind you that the contract refers to

(Testimony of Fred J. O'Brien.)

an even division of the commission between the broker and the firm? A. Yes, sir.

Q. What have you to say with reference to your practice where exclusive listings are brought in?

A. It has been the practice between the brokers and the firm to pay a listing fee to the broker who obtains an exclusive listing. Generally that is 10%. That 10% is deducted from the gross commission, and the balance divided one-half to the broker and one-half to Henry Broderick, Inc. Now, about a year ago, because of conditions where listings are very valuable, the brokers, between themselves, decided they would offer a little better inducement for obtaining exclusive listings, so now if a broker obtains an exclusive listing, and does not sell the property, he obtains 20% of the gross commission—that 20% is deducted, 5% from one-half which goes to the firm, and 15% of the half which would go ordinarily to the broker. In other words, the selling broker gets 35%, the listing broker 20% and Henry Broderick, Inc., 45%.

Q. In other words, if I understand it, during the past year, while the firm's share of the commission in the case of an exclusive listing has remained the same, [50] the brokers had agreed among themselves to give a better percentage to the one bringing in—to the broker bringing in the exclusive listing? A. That's right.

The Court: Well, if the broker who brought in the listing also makes the sale?

The Witness: That's a fifty-fifty deal. There

(Testimony of Fred J. O'Brien.)

is no inducement then for him to have more than half the commission.

Q. Tell us whether or not any of the brokers correspond on their own stationery, or write letters on real estate business from their own home?

A. Yes, sir, they do.

Q. Can the broker sell a piece of property for any price—for any other price than the list price—listed with your firm?

A. Yes, he can. It's a matter of negotiation between the buyer and the seller.

Q. That would be as a result of his contacts with the owner, would it not? A. That's right.

Mr. Eggerman: I believe that's all.

Cross Examination

By Mr. Winter: [51]

Q. Now, Mr. O'Brien, do you hold real estate meetings every morning—do you?

A. We have a real estate meeting every morning, yes, sir.

Q. What time? A. Except Saturdays.

Q. At what time is that meeting?

A. 8:45.

Q. 8:45? A. Uh-huh.

Q. And most of the real estate brokers attend, do they not?

A. Well, we—we have a pretty good attendance, yes, sir.

Q. And of course, if they're off working on a deal, of course they don't come to the meeting?

(Testimony of Fred J. O'Brien.)

A. It isn't compulsory that they come.

Q. What do you discuss at those meetings?

A. We discuss sales that have been made in and around Seattle; we have a list taken from the morning's Journal of Commerce, it shows the property, the buyer and the seller, the consideration; we also discuss listings that have been turned in; we all discuss firms; we ask the men to discuss between themselves experiences they've had the previous day or previous to that regarding real estate negotiations, and generally exchange ideas which might be beneficial to everybody. [52]

Q. Well, do the real estate salesmen, the employees, do they attend the meetings also?

A. No, sir.

Q. These are just meetings of the Real Estate Department?

A. That's right—that's right.

Q. And that meeting is held in the office of Broderick, in the real estate——

A. In the Real Estate Department. It's held in my office.

Q. And you are in charge of the meeting, are you not? A. That's right.

Q. And who else comes—what other officers of the firm attend that meeting?

A. Occasionally Mr. Baird comes into the meeting.

Q. And Mr. Broderick used to come into the meeting, didn't he? A. Well, occasionally.

Q. Before his sickness?

A. No, Mr. Broderick hasn't been in a meeting for several years.

(Testimony of Fred J. O'Brien.)

Q. Well now do you furnish these brokers with stenographic service? A. Yes, sir.

Q. And stationery? A. That's right.

Q. And with calling cards? [53]

A. Yes, sir.

Q. Do you have one of your own calling cards?

A. Yes, sir.

Q. May I see it, please? You don't mind if I have it? A. No, not at all.

Q. As a matter of fact you furnish cards to all the salesmen including the brokers, don't you?

A. Yes, sir.

Q. And they are printed and paid for by the firm? A. That's right.

Q. Do you have similar letterheads printed in each man's name? A. No, sir.

Q. Well, what stationery do they use—the Henry Broderick regular stationery?

A. If they care to.

Q. You also furnish telephone service to all of the real estate salesmen and brokers?

A. Yes, sir.

Q. And they are on the board—they are listed on your switchboard? A. That's right.

Q. The earnest money receipts are printed on forms of Henry Broderick Company?

A. That's right.

Q. And, as a matter of fact, all of the papers which go [54] into the transaction, are printed and paid for by Henry Broderick Company?

A. That's right.

(Testimony of Fred J. O'Brien.)

Q. Outside of the expenses which a man is going—which a broker has when he is out selling real estate, what expense does he have in the business?

A. We take care of practically all of the office expense.

Q. Then his only expense is, of course, transportation in going out and interviewing?

A. No, he has his expenses of licenses, insurance and bond—they pay for that.

Q. You have a broker's license yourself, haven't you? A. Yes, sir.

Q. In your own name? A. Yes, sir.

Q. Did you buy your own broker's license?

A. No.

Mr. Eggerman: Just a moment, if the Court please. This witness is an officer and stockholder in the company——

The Court: Oh, he can answer. Proceed.

The Witness: Will you repeat the question, please?

The Reporter (Reading): "You have a broker's license yourself, haven't you?"

"Answer: Yes, sir. [55]"

"Question: In your own name?"

"Answer: Yes, sir."

"Question: Did you buy your own broker's license? Answer: No."

A. I have a broker's license, but it is catalogued as a member of the firm.

Q. Yes. But you had a broker's license before you became a member of the firm, didn't you?

(Testimony of Fred J. O'Brien.)

A. Not immediately before. I had a broker's license twenty years ago and I dropped that broker's license when I went with the Government—I was with the Home Owners Loan Corporation for several years, and then I took another examination and I have now another broker's license.

Q. Well, the annual broker's license is the same as the annual real estate license, isn't it; real estate salesman's license, in policy?

A. I—I don't think it is now. I would have to check that; at one time it was the same. I believe the application fee is more for a broker's license now than it was then, uh-huh.

Q. But several years ago, I mean during this time 1943, it was all the same, wasn't it?

A. I think so.

Q. You say there are some eighteen or nineteen brokers? A. That's right. [56]

Q. And how many real estate salesmen?

A. Mr. Baird testified to eleven, I believe that's right.

Q. You don't have any under you in the Real Estate Department?

A. No, sir, with the exception of Mr. Barton, who is the manager of the real estate—of the residential sales department, and Mr. Barton has a real estate salesman's license, he supervises the activities of our residential brokers.

Q. Well, Mr. O'Brien, do any of your brokers specialize in the selling of business property—

A. Yes, sir.

(Testimony of Fred J. O'Brien.)

Q. And others specialize in selling residential property? A. Yes, sir.

Q. Do you assign them territory?

A. Well—a—no, there is no assignment of territory; there is this arrangement, where the broker lives in a certain section of town, for convenience, say, we—he specializes in that territory.

A. You assign him the listings in that territory—give him the listings in that territory, do you?

A. Well, if we have a call in that particular area, yes, sir.

Q. And there are certain men who are assigned listings [57] in all business districts, like Mr. Downs, for example?

A. Well, if a call comes in for a certain type of property I use my judgment in giving it to the broker who is best qualified to handle that type of a transaction.

Q. And you turn it over to him?

A. That's right.

Q. If a listing for a house came in, you'd turn it over to one of your men that you know could handle house sales better than the others?

A. I would either do it directly, or give it to Mr. Barton, who is the manager of the residential sales department.

Q. And then he would turn it over to the——

A. Well, the broker he thought best qualified to handle that particular type of inquiry.

Q. The listings give Henry Broderick the right

(Testimony of Fred J. O'Brien.)

to make the sale; it's not listed in the name of any broker. Is that right?

A. No, it's in the name of Henry Broderick, Inc.

Q. Any listings that a salesman gets, or a broker gets, he turns over to—the listing to Henry Broderick, Inc. A. That's right.

Q. And that listing is the property of Henry Broderick, Inc.? [58]

A. If it's an exclusive listing, the broker has an interest in that, as I explained about the commission agreement.

Q. Yes, but the listings is not taken in the broker's name, whether he——

A. No, no, it is taken——

Q. In the name of the firm?

A. That's right.

Q. The listing is taken in the name of Henry Broderick, Inc., and that's the way your earnest money receipts are made out?

A. That's right.

Q. Do the men in the morning make reports to you as to their progress of what they've been doing the day before at these meetings?

A. No, sir.

Q. Well, they discuss the case they were working on the day before?

A. Not necessarily.

Q. Well, I say occasionally they do, don't they?

A. Oh, if there is some experience that they think would benefit the rest of the brokers in the way of experience, but it isn't customary to do that,

(Testimony of Fred J. O'Brien.)

because in the real estate business, Mr. Winters, a man working on a deal keeps the negotiations quite confidential. [59]

Q. Well, you try to get men that are competent and well qualified and who have experience——

A. That's right.

Q. In selling real estate? A. That's right.

Q. And when you interview them that is your purpose? A. That's right.

Q. To get men of substance, and someone who can meet the public and not be a detriment to Henry Broderick, Inc.? A. That's right.

Q. In other words, you have in mind Henry Broderick's long standing in doing a good job in the real estate business? A. That's right.

Q. You wouldn't long keep one of these brokers associated with you who was out selling real estate for someone else, all the time, would you?

A. No, he would be breaking our agreement.

Q. In other words, under your agreement he is required to—to work for Henry Broderick and not for anyone else? A. No—no——

Mr. Eggerman: Just a minute——

The Witness: The written contract doesn't state that.

The Court: Well, but what is the practice?

The Witness: The practice is, that if a [60] man does not devote enough time to the consummating deals with Henry Broderick, while he is associated with Henry Broderick, we generally have an interview with him and ask why he can't spend

(Testimony of Fred J. O'Brien.)

more time working on deals with us, and if he engages more than half the time, we will say, in some other business, I think it is to the best interest of both parties, that he——

The Court: Well, we're not talking about other business, but, outside the real estate business, the business of selling real estate and taking listings, for real estate, leases; haven't you had brokers or do you permit them to make sales for some other concern without reporting in to you and clearing through your establishment?

The Witness: No, that is not done, your Honor.

The Court: It isn't done, or you wouldn't permit it?

The Witness: No, I—I don't think it would be a satisfactory arrangement.

The Court: Well, have you had experience where they attempted to do that?

The Witness: No, sir, I don't know of any.

The Court: Have you had any experiences where they attempted to transact business on their own independent of Broderick in part of their transactions?

The Witness: That has come to my attention.

The Court: If they did that would you consider that a breach of a partnership—or employment, or whatever it might be called?

The Witness: Yes, I would consider that a breach of our agreement.

The Court: I have another question or two, and you may go on after I get through.

(Testimony of Fred J. O'Brien.)

Now, on these automobiles or other means of transportation that they use in carrying on the business, do they carry any insignia on there indicating who they are, or who they are associated with?

The Witness: No, sir.

The Court: Nothing to show that they are brokers associated with Henry Broderick?

The Witness: No, sir.

The Court: Any—and none of them have any individual stationery that identifies them as associated with the Henry Broderick Corporation?

The Witness: Not that I know of, your Honor.

The Court: Well, do they have a free hand each morning at your whole listings; do you have, say fifty listings that are open for servicing—you have eighteen brokers. Can they just take them as they wish? [62]

The Witness: Yes, sir. I wish—pardon me, your Honor, fifty listings would be a wonderful position to be in.

Mr. Eggerman: I can't hear you.

The Witness: Pardon?

Mr. Eggerman: I can't hear you.

The Witness: I was going to mention this, at this time listings are so scarce that we never have fifty, but say we have five, your Honor—

The Court: Five — and you have eighteen brokers?

The Witness: That's right. We make a copy

(Testimony of Fred J. O'Brien.)

of each analysis and give it to the brokers, and they can work on the property.

The Court: They can all work on the property?

The Witness: That's right.

The Court: If they wish?

The Witness: That's right.

The Court: And then, don't you—aren't you then confronted with the problem of how you are going to divide the commissions?

The Witness: No. The agreement between the brokers and the office is the man that brings in the first check as an earnest money deposit on that property has the preference, and we do not invite other deposits until that deal is either rejected or consummated.

The Court: I think that's all that I wish to ask.

Mr. Eggerman: Just two questions, Mr. O'Brien.

Redirect Examination

By Mr. Eggerman:

Q. Is it a fact that in addition to being an officer you are a stockholder, yourself, in the plaintiff firm? A. Yes, sir.

Q. Now, with reference to the listings you testified to awhile ago, I think you said that if a listing in a particular residential area come in, that you would call that to the attention of the man specializing in that area?

A. No—a—suppose a listing would concern a residential area, that listing would be copied and given to every one of the residential sales brokers.

(Testimony of Fred J. O'Brien.)

Q. And does that also apply to those specializing in business property? A. Yes, sir.

Q. In other words, then, I want to make this clear, I couldn't understand you in your answer to Mr. Winter, do you attempt to give priority to any particular [64] broker on any business that he has—can do?

Mr. Winter: Now, we suggest that the question is leading, if the Court please.

Mr. Eggerman: I'm just asking a question—haven't suggested an answer.

The Court: He may answer.

A. No, sir, we do not. But there are brokers who are more qualified to handle certain types of inquiry than others.

Q. Very well.

A. And so we, in assigning these inquiries, try to use judgment in making the best assignment for the benefit of the broker and Henry Broderick, Inc.

Q. In other words, who is specializing in Mount Baker residential property on the rolls?

A. At this time, Mr. Samsell, Howard Samsell.

Q. Does that fact prevent another broker from selling Mount Baker property?

A. It does not.

Mr. Eggerman: That's all.

Recross Examination

By Mr. Winter:

Q. Mr. O'Brien, when you give one man an

(Testimony of Fred J. O'Brien.)

assignment, isn't it understood amongst the other brokers that no—that none of those other brokers will work on that assignment [65] until he is finished with it?

A. You're talking about the prospective purchaser now?

Q. Well, when he gets——

A. Assignment of a prospect or listing?

Q. Yes. Well, either one?

A. Well, it's only good business, Mr. Winter, that only one broker contact a prospective purchaser. It wouldn't be practical for two or three brokers to discuss a residence, I don't think at the same time; that same thing goes in investment property. It does not mean that they can't do it.

Q. Well, when you give one of the brokers an assignment he handles that assignment and takes care of that customer? A. That's right.

Q. And the other brokers don't do anything until he is finished with that assignment, do they?

A. Certainly not.

Mr. Eggerman: Just a moment, if the Court please. The witness was talking originally about these analyses, which is the listing. Now he is confusing this with a prospect. When the witness testified that he gave an analysis of the piece of property first to the——

The Court: I don't think it's necessary to [66] make an argument. This witness is an intelligent witness, I am sure he understands the real estate business perhaps better than any of the rest of us.

(Testimony of Fred J. O'Brien.)

Mr. Eggerman: I think so.

The Court: But what I want to get clear is now, you said that anyone of your staff of associate brokers may take your whole list and go out and sell a property that is listed with you, and if he is the first of the eighteen, or sixteen that you have, to come in with an earnest money check, why the sale would be credited to him if it was ultimately consummated?

The Witness: Yes, sir.

The Court: And then, in answer to the question that Mr. Winter asked, of when—that you make a listing and give it to a broker, the others are all supposed to keep hands off?

The Witness: No, sir.

The Court: That's what I want to get clear.

The Witness: Your Honor, I'll attempt to clarify that. A listing comes in and we make the necessary copies to distribute that listing to all of our brokers. Now in the case of our associated residential brokers, they not being interested in commercial property, they get all of these residential listings. In the case of a commercial broker, he gets copies of [67] all of the commercial listings. Now if one of the brokers was successful in obtaining an earnest money deposit, he brings that in to the office, and we tell the rest—the other brokers that there is a deposit on that particular piece of property; the other brokers do not attempt to bring in another earnest money deposit until that first offer is disposed of.

(Testimony of Fred J. O'Brien.)

The Court: Well, then, all your residential brokers, when they start out in the morning, they start out with the whole listings that you have?

The Witness: That's right.

The Court: All of them.

The Witness: That's right.

The Court: And all of your commercial brokers likewise have a listing, or complete listing of all the commercial——

The Witness: That's right.

The Court: And they're not given individual assignments in either case?

The Witness: No, sir. I referred to assignments a few minutes ago. We will refer to Mr. Samsell, our broker who is living in Mount Baker. He specializes in residential sales in the Mount Baker area. If we have a call or inquiry for property in Mount Baker, that number or name would probably be [68] referred to Mr. Samsell.

The Court: Well, then, won't it be referred, likewise, to all the rest of the group?

The Witness: Referring to prospects, your Honor, I'm not referring to listings now. If a listing comes in we will make a copy of that listing and that will be distributed to all the brokers, but we do not make a practice of giving the name of prospects to more than one or two brokers, and the one or two brokers are the men we feel are best qualified to handle that particular type of an inquiry.

The Court: And if you find they haven't been successful after you furnish them with the list, then you give it to another one?

(Testimony of Fred J. O'Brien.)

The Witness: No, sir, not generally, because the men are all independent operators; they generally follow through on the listings, or on the inquiries or prospects, and either consummate a sale or decide in their own mind that it's hard to sell them.

The Court: If there is any difficulty arising, resulting in a dispute, short of litigation, and the property owner or the buyer becomes involved, do you settle those disputes through your office, or corporation, or do you just leave it to the individual broker?

The Witness: Well, we feel that the individual [69] broker should settle any dispute. We fortunately haven't had very many disputes.

The Court: Well, if any litigation grew out of—litigation for commission, or litigation for anything that—there's a hundred things that might arise from such a transaction, would the corporation then take the matter over and care for it?

The Witness: We would do that, yes, sir. We would do that, I'm sure as far as our interest appears.

The Court: You mean you haven't had those situations?

The Witness: No, no, I'm sure we have not. I don't recall any such cases.

The Court: You never considered the brokers as your agents?

The Witness: No, no. We consider the brokers just as associates; they—we furnish them office

(Testimony of Fred J. O'Brien.)

space as the contract calls for; we do not exercise any supervision over them, your Honor.

The Court: I think that's all.

Mr. Eggerman: I would like to have the records show, Mr. O'Brien, precisely what you mean by the word "listing". When you say "distribute listings" what is that? [70]

A. A listing is a form showing all the details in connection with a certain piece of property, including the address, the description; in the case of a residence, the number of rooms, type of construction, encumbrances, the asking sales price.

Q. The details of the property?

A. The details of the property.

Mr. Eggerman: That's all.

Mr. Winter: That's all.

(Witness excused.) [71]

ARTHUR ENGE,

produced as a witness on behalf of the plaintiff, after being first first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. State your name to the Court, please.

A. Arthur G. Enge:

Q. How do you spell your last name?

A. E-n-g-e.

(Testimony of Arthur Enge.)

Q. And you are likewise associated with the plaintiff? A. Yes, sir.

Q. In what capacity?

A. I am Treasurer of the company.

Q. And you are likewise a stockholder in the company? A. Yes, sir.

Q. What do your offices embrace as—your duties as Treasurer embrace?

A. They embrace responsibility for paper work in connection with the accounting, procedures in the three departments of our office—real estate, property management and insurance.

Q. How long have you been associated with the firm? A. For—pretty near five years.

Q. I beg your pardon?

A. As an officer for nearly five years, and associated [72] as an employee for about sixteen.

Q. Now, first with reference to the salesmen. You are in charge of the books; do you know who pays for their salesmen's licenses and the premiums on their bonds?

A. Yes, I do. Henry Broderick—

Q. Who does that?

A. Henry Broderick, Inc., does.

Q. Are they on a salary basis or otherwise?

A. They are on a salary basis, plus a bonus arrangement.

Q. How often is their salary paid?

A. Twice a month.

Q. Now, what does the bonus consist of?

(Testimony of Arthur Enge.)

A. It consists of a percentage of the commissions that are earned by the office with respect to their activities, together with a bonus for bringing in new property management accounts, and so forth.

Q. And are their salary and bonus accounts under your supervision? A. Yes, sir.

Q. What percentage of their time, on an average, is devoted to efforts to make sales, or to make leases and so on?

A. Well, I would say less than 25%.

Q. What, however, are they required to do before they can endeavor to earn bonuses in those activities?

A. Well, they are required to hold down their jobs and [73] perform other duties that they are paid a salary for, which is the management of the properties that are under our care.

Q. Now, when their efforts bring a commission into the firm, either a lease or sale commission, where does that commission go—into what account?

A. It goes into a profit and loss account, which might be designated to the Real Estate Commission or Rental Commission, depending upon the nature of the deal that they have been instrumental in making.

Q. Are these two accounts, one a rental and the other sales accounts? A. Yes, sir.

Q. Tell us whether they are both profit and loss accounts?

A. They are both profit and loss accounts.

Q. Now, does the firm immediately pay the

(Testimony of Arthur Enge.)

salesmen when he brings a commission into the firm?

A. Not unless it should happen to coincide with the regular pay day.

Q. Otherwise when is it payable?

A. On the regular pay day.

Q. Does the firm require these employee salesmen to pay any part of their sales expense, such as may be necessary in these activities?

A. No, sir. [74]

Q. What is the difference, if any, between the expenses that the salesmen—real estate salesmen have to bear, or not bear, and those which the brokers have to bear?

A. A broker is obliged to pay all his expenses of whatever nature; a salesmen is not required to pay any expenses he may be put to.

Q. Now, if a broker should become an employee of your firm—I mean one holding a broker's license, if he should become an employee of your firm, is he permitted to continue as a salesman for you under his broker's license?

Mr. Winter: We object to that, in that it calls for a conclusion. It is a question of law as to whether or not——

Mr. Eggerman: No, I am asking him if the firm would continue to hire him, and I think this witness, in charge of the books and as Secretary of the company, or rather Treasurer, should know the answer.

(Testimony of Arthur Enge.)

The Court: Will you please repeat the question again?

Mr. Eggerman: Is he permitted to continue with the broker's license as an employee, on your payroll, if he has only a broker's license?

A. No, he is not. [75]

Q. What does he have to do?

A. He's required to surrender his broker's license and make application and obtain his salesman's license.

Q. Who pays the oil, gas and upkeep on the broker's car? A. They pay them, themselves.

Q. Now, turning again to bookkeeping, Mr. Enge. I understand that's in your department?

A. Yes, sir.

Q. Is there any distinction in the manner in which the commissions are handled, where a commission emanates from the efforts of a broker, as contrasted with the commission that is brought in as a result of the activity of a salesman?

A. Yes, there is a very distinct difference.

Q. Now just explain that to the Court, will you?

Mr. Winter: If the Court please, the books are the best evidence; if they're going to ask him to testify about some accounts—let's have the accounts.

Mr. Eggerman: If the Court please, I am asking for his procedure, generally, I am not asking for any specific thing now.

The Court: He can answer.

A. In the case of a broker, the commission, as has been previously described, comes to him out of

(Testimony of Arthur Enge.)

the—the [76] escrow account which is set up under the name of the seller and the purchaser, at the same time that the commission comes in to the profit and loss account of Henry Broderick, Inc., through its share. In the case of a salesman, in the event that it is an escrow deal, the commission is all distributed and paid in to the profit and loss account at the time of consummation of the deal.

Q. Whose profit and loss account?

A. The profit and loss account of Henry Broderick, Inc., without reference to any bonus that may be due to the salesman.

Q. How are these accounts that you term “escrow accounts” headed or entitled?

A. By the name of the seller and the purchaser.

Q. And what usually constitutes, in practice, the first entry in such an account?

A. The earnest money deposit.

Q. And as the deal progresses and money is paid on the purchase price, where does that go?

A. Into that same account.

Q. When is any portion of that commission first entered in the profit and loss account of Henry Broderick, Inc.? I am talking about brokers' transactions.

A. When the deal is consummated and the commission distributed. [77]

Q. And when does the broker receive his portion of the commission? A. At the same time.

Q. With respect to the firm?

A. At the same time.

(Testimony of Arthur Enge.)

Q. Now, if the broker, regardless of the amount of time that he may have spent in endeavoring to make a deal, if he is unable to make the sale or make a lease, does he get anything from the firm?

A. No, sir.

Q. Where are the earnest money receipts frequently signed?

A. Most frequently, I believe, in the office of the buyer or at his home.

Q. And where are the closing details frequently worked out?

A. Most often, I believe, at the same location that the earnest money is signed.

The Court: Of course, that would be true of your salesmen, also, wouldn't it, if they made a transaction?

The Witness: The salesmen would probably require a good deal more help and supervision and would have to have it brought in to the office,—

The Court: No, but if the salesman had the capacity to close the deal, he probably would close it in the same manner as the broker did, wouldn't he? [78]

The Witness: If he had the capacity, I imagine that would be true.

The Court: That's all.

Mr. Eggerman: That's all, Mr. Enge.

Cross-Examination

By Mr. Winter:

Q. Mr. Enge, if I understand you correctly, just

(Testimony of Arthur Enge.)

as soon as a salesman or a broker obtains an earnest money receipt, you establish an escrow account on your books in the name of the seller and purchaser, do you not? A. That's right.

Q. And there would be no distinction, up to that point, whether it was a salesman making the sale, or a broker making the same, is there?

A. No, sir.

Q. All right. Just as soon as that transaction is completed, if the salesman makes the sale and it happens that it's on his last pay day, then he is given a check for that additional amount and the profit to Henry Broderick goes over to profit and loss account?

A. That's not exactly right, sir.

Q. Well, he gets paid—the salesman gets paid that very [79] same day, doesn't he?

A. He wouldn't be under those circumstances.

Q. And you issue a check to the salesman on that account, do you not? A. No, sir.

Q. You issue——

Mr. Eggerman: Pardon me, Counsel, I think you ought to allow the witness to finish answering your question.

The Witness: I was going to tell you on what account I did charge that commission check which the salesman——

Mr. Winter: Well, it all goes into an escrow account when the money is paid in in the first instance, does it not? A. That's right.

(Testimony of Arthur Enge.)

Q. And that's an escrow account until the transaction is consummated?

A. That's right.

Q. And when the transaction is consummated, in the case of a salesman, Broderick gets their 60% and the salesman, at the end of the month, he gets his 40%, doesn't he?

A. There's an intervening step there that I think should be pointed out.

Q. Well, the intervening step is that you run it through— [80] through the books, making it a few weeks later because it's pay—I mean a couple of weeks later because that's his pay day, is that right?

A. That isn't the whole story, sir. May I describe it?

The Court: Yes, go ahead.

The Witness: The commission goes into the profit and loss account of Henry Broderick, Inc., in its entirety; the commission, or bonus, that may be paid with respect to that—to the employee, is then given to him with his pay check, and charged not to that escrow deal, nor to that income account, but charged to another expense account, called "Compensation for Services."

Q. Well, you give the—you give the salesman your check, do you not? Henry Broderick's check?

A. It's a payroll check—a different one than the type we give to the broker.

Q. You give the broker a Henry Broderick check?

A. Not on the same account, however.

(Testimony of Arthur Enge.)

Q. Well, the account is never in the name of the broker, is it?

A. Which account is that, sir?

Q. The escrow account? A. No, sir.

Q. The broker has no authority to issue a check [81] against that account, has he?

A. No, sir.

Q. Who signs the checks—do you sign the checks? A. No, sir. I do not.

Q. Who has authority to sign those checks, only someone belonging to Henry Broderick?

A. That's right.

Q. But the salesman, he has to wait until his next pay period before he is paid his commission?

A. That's right.

Q. But the broker, he is paid his commission as soon as he—as the transaction is consummated?

A. It comes right out of the escrow deal.

Q. You don't provide for any drawing account for your brokers, do you? A. No, sir.

Q. Do they ever borrow money from the company? A. No, sir.

Q. At no time have you ever made them loans or advances to the brokers?

A. Not in my—not in my recollection of sixteen years.

Q. Do you make any advances to the salesmen that are on a salary basis?

A. It has been done, yes, sir.

Q. Of course, these salesmen, they get a commission from [82] getting leases, do they? If the

(Testimony of Arthur Enge.)

salesman goes out and gets a lease for Broderick, doesn't he get a commission on that?

A. If there is a cash commission payable to Henry Broderick, Inc., for that lease.

Q. Well, does the broker get a commission also, for making leases for Henry Broderick, if there is a commission paid on it?

A. If he makes the lease it is handled in the same way, through the escrow accounts, that he—that it would if he made a sale.

Q. You mean the first money—lease money that is paid down, goes into an escrow account, is that true?

A. The deposit goes into the escrow account and subsequent payments.

Q. And when the lease is consummated then he is paid his commission?

A. It comes right out of the same deal, the same way as in the other deal.

Q. You have a form of authority to sell real estate used by the corporation during the course of this period? A. Yes, I do, sir.

Q. Would you produce it? I would also like a copy of your form of your Earnest Money contract, and Earnest Money receipt. [83]

A. You can help me——

Q. Well, that listing form is what I wanted first, of the seller.

A. Here is an earnest money receipt form.

Q. You don't mind if I use these forms, do you

(Testimony of Arthur Enge.)

—have them identified. These are just copies or specimens.

A. I believe these are obsolete forms.

Q. I show you one that has been marked for identification Defendant's Exhibit A1. Will you just state to the Court what that is?

A. It's an authority to sell Real Estate, used in connection with our house listings.

Q. Is that a form which has been used by Broderick during the period of time here involved?

A. It is.

Q. And you secure such an authority from the prospective seller. Is that right?

A. That's right.

Q. And that is—who is that made out to—Broderick & Company?

A. Yes, Henry Broderick, Inc.

Q. Do you have a similar form with respect to a blue form? Is that the same type as the form, this one here I am showing you?

A. Mr. Winter, I'm sorry to say I don't know.

Mr. Winter: I think we better have them both marked. We will offer in evidence as Exhibit A1.

Mr. Eggerman: No objection.

The Court: It will be admitted in evidence.

(Whereupon form referred to was received in evidence and marked Defendant's Exhibit A1.)

[Defendant's Exhibit A-1 set out on page 40.]

(Testimony of Arthur Enge.)

Q. I show you what has been marked for identification Defendant's Exhibit A2, and ask you to state to the Court what that is?

A. This is also an authority to sell real estate, and I believe the difference between this and the white one is that this is an exclusive authority, whereas the white one is not exclusive.

Q. You mean A1 is the exclusive and this is—

A. The A2 is exclusive; the A1 is not exclusive.

Mr. Winter: We will offer in evidence Defendant's Exhibit A2.

Mr. Eggerman: No objection.

The Court: It will be admitted in evidence.

(Whereupon, form referred to was received in evidence and marked Defendant's Exhibit A2.)

[Defendant's Exhibit A-2 set out on page 41.]

Q. I will show you what has been marked for identification Defendant's Exhibit A3, which appears to be two sheets of paper, the white sheet—

A. Yes, sir.

Q. Will you just state to the Court what that exhibit is? [85]

A. These are the office listing forms—the white one to be used in listing properties that are not for sale with our office exclusively, and the pink one—the same form—covering an exclusive listing.

Q. Those listings are always taken in the name of Broderick and Company, are they not?

(Testimony of Arthur Enge.)

A. I don't believe they would be taken in anyone's name; if they are on this form it's just as a matter of convenience.

Q. Well, they are secured by Broderick from the salesmen or through their advertising, or some other manner, are they not, the listings?

A. Or brought in by the broker, yes.

Q. I show you what has been marked——

Mr. Winter: We will offer in evidence what has been marked Defendant's Exhibit A3.

The Court: Will you let me see that?

Mr. Eggerman: No objection.

The Court: It will be admitted in evidence.

(Whereupon white and pink forms referred to were received in evidence and marked Defendant's Exhibits A3 and A4, respectively.)

[Defendant's Exhibits A3 and A4, respectively, set out on pages 51 and 52.]

Q. Would you just state to the Court what that document is, which has been marked for identification Defendant's [86] exhibit A5?

A. There are two forms here, the yellow one is an Earnest Money Receipt, and the pink one is an Earnest Money Contract.

Q. Are those two forms which have been used by Henry Broderick during the period here involved?

A. I believe that most of our deals would emanate from a form of this kind.

(Testimony of Arthur Enge.)

Mr. Winter: We offer in evidence Defendant's Exhibit A5.

Mr. Eggerman: No objection.

The Court: It will be admitted.

(Whereupon yellow and pink forms referred to were received in evidence and marked Defendant's Exhibit A-5.)

[Defendant's Exhibit A-5 set out on pages 53 to 56.]

Q. Referring to what has been marked for identification Defendant's Exhibit A6, will you just state to the Court what that is?

A. This is also an Authority to Sell Real Estate where an exclusive—it is an exclusive authority for a certain period, which is used—

Q. By Henry Broderick, Inc., during the period here involved? A. That's right.

Mr. Winter: We will offer in evidence [87] defendant's Exhibit A6.

Mr. Eggerman: No objection.

The Witness: I would like to add just this minor point; the rate of commission which is covered in that authority has been changed a little since the period at issue, but otherwise the wording is the same.

(Whereupon document referred to was received in evidence and marked Defendant's Exhibit A6.)

[Defendant's Exhibit A6 set out on pages 57 and 58.]

(Testimony of Arthur Enge.)

Q. Mr. Enge, we served on your Counsel a notice to produce the Corporation books showing the escrow account, both for salesmen and brokers. Did you bring those books?

A. I have it right there.

Q. Would you turn to—would you find in the books a broker's account—I mean an escrow account where the property was sold by a Real Estate salesman, and the same form of account where the property was sold by a broker?

Mr. Eggerman: May I approach the witness to see.

The Court: Yes. [88]

A. On page—we haven't a page number, these are—at that time we didn't use the present system of indexing so we didn't have the number; these are listed in here in chronological order as the Earnest Money receipts come in. And on this page there's a record of an escrow account where the deal was made by an associate broker, and an Exclusive Listing Fee paid to another associate broker. On the opposite page, under a deal headed "Sloan & Kelly" is the entry covering a deal negotiated by a salesman, in which you can plainly see the difference in the handling of the commission.

Q. Well, they're both in the general ledger, aren't they?

A. They're not in the general ledger, no, sir.

Q. Isn't this your general ledger you're reading from?

A. No, sir. That's the escrow ledger.

(Testimony of Arthur Enge.)

Q. Well, they're both in the escrow ledger then?

A. That's right.

Q. Whether the sale is made by a salesman or by a broker? A. That's right.

Q. And, one further thing, Mr. Enge, you were asked to give approximately the totals of real estate sales made by admitted salesmen and the totals of real estate sales made by the so-called brokers. Did you make such a computation? [89]

A. After a good deal of hard work, we did, sir, but I'd like to ask exactly what conclusion—I mean, you're speaking of sales price total commissions or what?

Q. Well, I just want the relative values in sales made by a salesman, and the relative value in dollars and cents made by brokers?

A. I can give you percentages. I have those.

Q. Well, that's just what I want.

A. A survey of '43 and '44 sales reveals that 84% of the sales negotiated in those two years was made by real estate brokers, and that 16% for the two years—

Q. Made by Real Estate salesmen?

A. Through the efforts of real estate salesmen.

Q. Would you say that that relative percentage is being maintained about at the present time, approximately?

A. If any, the trend would be so that the brokers are making more now than at that time.

Q. In other words, more than 84%, would you say? A. Yes, sir.

(Testimony of Arthur Enge.)

Q. 84% of your sales, of Henry Broderick, were being made through the brokers.

A. That is right.

Q. And only 16% through your admitted employees? A. Yes.

Q. Oh, you said that if a person, if a salesman came to [90] work for you, you wouldn't—strike that. I think you said that if a broker started to work for you on a salary, he would have to give up his Broker's License. Is that the way I understand you?

A. That's right. That's right.

Q. Why do you say that, Mr. Enge?

A. In the essence of his Real Estate Broker's License, as I understand it, is that we may have no control over him, if he—

Q. That's your understanding; that's the reason you make that statement. Is that so?

A. Yes, sir.

Q. Mr.—You're Vice President Mr.—Your Secretary Mr. O'Brien, he has a Real Estate Broker's License, hasn't he? A. He does.

Q. And he's employed by the Company, an officer, a stockholder? A. That's right.

Q. And your Vice President is also a broker?

A. That's right.

Q. And he sells Real Estate for the corporation account? A. Generally.

Q. Yes. Yet, unless he's an officer you think that he couldn't sell real estate for Henry Broderick if he has a broker's license?

(Testimony of Arthur Enge.)

A. I believe there's a peculiar act in the license law [91] which not only does not permit the officers who have a salesman's license, but that's required. I'm not sure of that point, but that's the reason—

Q. Well, would that be the only reason why you wouldn't hire him if he had a broker's license; you wouldn't think he'd be any less qualified, would you?

A. No, not a matter of qualification.

Q. In other words, as you understand the law, it would be otherwise where you couldn't employ him, is that what you understand?

A. We have to be able to control our employees.

Mr. Winter: That's all.

Mr. Eggerman: Just one question, Mr. Enge.

Redirect Examination

By Mr. Eggerman:

Q. You produced your escrow ledger and you, in answer to Counsel, make the statement with reference to these two accounts, one a transaction in which a broker was involved, and the second transaction where a salesman was involved, and you said you would illustrate the distinction in which they are handled. You didn't get to finish and state into the record what that difference was. Will you do so? Referring to these two accounts?

A. In the case of the Sloan to Kelly deal, which was made by a salesman, the entire commission is labeled [92] Real Estate Commission—Residential, I believe, and that's the only commission shown on that particular account.

Q. And that is which account?

(Testimony of Arthur Enge.)

A. That's the one that is made by a salesman. The other account, negotiated by a Real Estate broker, shows the amount of the commission that went to the broker on that date, and I believe on the same date or right close to it, the amount that went to the profit and loss account of Henry Broderick, Inc. It is the same date, the 24th of May.

Q. Does the name of the salesman appear at all on the transaction—the escrow transaction involving the salesman? A. No, sir.

Q. His name doesn't even appear?

A. No, sir.

Q. And does the name of the broker appear in the other transaction? A. It does.

Mr. Eggerman: That's all.

Recross Examination

By Mr. Winter:

Q. What—what would show in the payment of commission to [93] the salesman?

A. The earnings record on which is kept the amount of his salary and other commissions.

Q. On the escrow account of this salesman, where does it show there that the salesman made the sale; what indicates that the salesman made the sale on that transaction?

A. The original file set up when the escrow account is started would reveal who should get the credit for the transaction.

Q. Who should be paid? A. That's right.

Q. But with respect to the brokers you show it

(Testimony of Arthur Enge.)

right on this one account because he doesn't have a salary coming, is that right?

A. It shows there because it's posted there out of the cash book when he gets his commission check.

Q. And you issue a check out of that account to the broker—— A. That's right.

Q. When it is completed?

A. His check comes directly out of that account.

Q. Well, the check of the salesman comes out of that account because it's all paid in there when the transaction is completed, isn't it?

A. The check of the salesman does not come out of that [94] account.

Q. Well, all of the money is paid into that account, is it not? A. Yes.

Q. Whether a salesman is handling it or whether a broker handles it. And then when the transaction is completed, the salesman on his next month's—or next two pay days gets paid, the same as the broker does, doesn't he?

A. He gets paid on a different form of check as bonus.

Q. Well, it's just on a different form of check——

Mr. Eggerman: We object, your Honor. It's all repetition, Counsel has gone into this two or three times.

The Court: I think it is repetition.

Mr. Winter: Well, that's all.

(Witness excused.) [95]

MELVILLE WILSON

produced as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Eggerman:

Q. State your name, please?

A. Melville Wilson.

Q. Where do you live? A. Seattle.

Q. And how long have you lived in Seattle?

A. Since 1905 except for three years in California.

Q. And what is your business or profession?

A. Real Estate broker.

Q. How long have you followed the real estate business? A. Since 1911.

Q. All of that in Seattle or part elsewhere?

A. Except three years in California.

Q. What kind of a license do you carry?

A. Broker's license.

Q. And who made application for that?

A. I did.

Q. And who paid for it? A. I did.

Q. Who furnished the bond and paid the bond premium? A. I did. [96]

Q. Did you make the application for the broker's license? A. Yes.

Q. Why didn't you apply for a salesman's license? A. I don't want to be a salesman.

Mr. Winter: He is calling for a conclusion of the witness.

The Court: Objection overruled.

(Testimony of Melville Wilson.)

Q. Why don't you want to be a salesman?

A. I don't want anyone to have control over me.

Q. How long have you been associated as a broker—real estate broker for the firm, Henry Broderick, Inc.?

A. Since 1938.

Q. And did you sign one of these specimen contracts?

A. Yes.

Q. Do you remember what date, approximately?

A. About the end of December, 1938.

Q. Who pays the expenses that you incur in your sales activities, I mean, other than the office—

A. I do.

Q. Those are the office facilities referred to in the contract?

A. That's right.

Q. What, as to all the expenses except those office facilities, who pays for those?

A. I do. [97]

Q. Who pays the taxes that you have to pay to the state?

A. I do.

Q. Now tell us whether or not you have had access, since you have been an associate broker, to the listings in the office of Henry Broderick, Inc.?

A. I have.

Q. Do you ever attend the sales meetings testified to by Mr. O'Brien?

A. Whenever I can conveniently.

Q. Do you have to do that?

A. Oh, no.

Q. What's done at these meetings that you attend?

A. A good deal of general information pertaining to the business comes out from different brokers, the stories of sales that have been made, rec-

(Testimony of Melville Wilson.)

ords from the Journal of Commerce, new leases, new sales, new properties listed, all that information is valuable to me.

Q. Do you get any instructions or orders from anyone in Henry Broderick, Inc., then or any other time as to what you are to do? A. No.

Q. Do you keep any regular hours——

A. No.

Q. ——in the real estate business?

A. No. [98]

Q. When do you work?

A. Usually when I feel like it.

Q. You have a car you own? A. Yes.

Q. And the expenses of the car is paid for by whom? A. I pay it.

Q. Do you have an insurance policy?

A. Yes.

Q. And who pays for that? A. I do.

Q. Who is the insured? A. I am.

Q. You heard the testimony, I think, of Mr. O'Brien, with reference to brokers or at least some of them desiring to specialize in certain areas?

A. Yes.

Q. Do you specialize yourself in any area?

A. Practically so. Once in a while I step out of my specialty.

Q. Do you also specialize in the type of property? A. Yes.

Q. What is your special——

A. Commercial.

Q. Sir?

A. Commercial property—business property.

(Testimony of Melville Wilson.)

Q. At whose suggestion or wish do you specialize in commercial property? A. My own.

Q. Does that fact—would that fact prevent you or has it prevented you from making a deal in residential property if you wanted to?

A. No, I sold a house here a couple weeks ago.

Q. Are you required to make any specific calls during the day by the firm? A. No.

Q. Are you under any instructions from the firm as to what your activities shall be?

A. No, none at all.

Q. Are you required to give your entire time to the real estate business?

A. I don't give all my time to it.

Q. What business do you also follow?

A. Food brokerage.

Q. And who determines the amount of respective time that you give to the food brokerage business and the real estate brokerage business?

A. I do.

Q. Are there any other brokers, so far as you know, associated with Henry Broderick, Inc., that likewise devote some of their time to other activities? [100]

A. Yes, the ones that were mentioned by one of the other witnesses.

Q. In this trial—today?

A. In this trial, Mr. Stewart and Mr. Robbins.

Q. Now, if you don't make a sale for a period of time, do you receive anything at all from the firm of Henry Broderick, Inc.? A. No.

(Testimony of Melville Wilson.)

Q. In your experience, where are the earnest money receipts customarily signed?

A. Usually in the buyer's office, or in his home, or in his lawyer's office, once in a while——

Q. Are they necessarily along any particular form? A. No, I used many forms.

Q. Many forms. Forms other than bearing the name Henry Broderick, Inc.?

A. Yes, I've used the Washington Title Insurance Co. form.

Q. Do you remember any of those ever being signed in the office of Henry Broderick, Inc., in your experience?

A. Yes. I had one signed in there about two weeks ago—three weeks ago.

Q. Is that the rule or the exception in——

A. That's the exception.

Q. How about the closing papers. Where are they executed? [101]

A. Either in the escrow department of Henry Broderick, Inc., or in some lawyer's office, or completed in the seller's or buyer's office.

Q. Now as to the mode of approaching a buyer—that is, a prospective buyer, who determines the strategy and the psychology of your operations?

A. Well, I have to.

Q. Does anybody have—does anybody else have anything to say about it? A. No.

Q. How about advertising, do you do any advertising? A. Not very much.

(Testimony of Melville Wilson.)

Q. And when you do, who composes the advertising? A. I do.

Q. And where do you submit it? Is it entered in the papers? A. Yes.

Q. Does your name appear likewise?

A. Oh, yes.

Q. Now when you have closed the deal, as you say, you know what I mean by a closed deal?—

A. Yes.

Q. So that the monies in this escrow account which has been testified to are paid out for insurance and taxes, adjustments and so forth, and there remains in that account usually what is the last amount that is distributed? [102]

A. Well, off hand I'd say the commission would normally be although that's not always true. Your adjustments are known quantities and the commission might come out first and the other come out later.

Q. But when that commission first goes out of that escrow account, where does it go?

A. It goes to me,—mine.

Q. How much? A. 50% of it.

Q. Does Henry Broderick, Inc., get any part of it until you do? A. No.

Mr. Winter: If the Court please, I don't want to interrupt, but all these questions are leading, if the Court please, and suggestive.

The Court: Perhaps—

Q. Tell us whether or not you have ever sold

(Testimony of Melville Wilson.)

property for other real estate firms in the city while you were under this association?

A. Oh, yes, lots of times.

Q. And is the transaction any different whether between you and the plaintiff firm, as the transactions you testified to?

A. No different at all. [103]

Mr. Eggerman: I believe that's all.

Cross-Examination

By Mr. Winter:

Q. You say you've lived in Seattle since 1905, Mr. Wilson?

A. That's right.

Q. How long have you been selling real estate?

A. Selling real estate probably since the early 20's.

Q. When did you first take out your broker's license?

A. Whenever they required it. I don't know just when that was—a good many years ago.

Q. A long time before you went to work for Broderick? A. Oh, yes.

Q. Who else have you worked for—who else have you been associated with in the real estate firms in Seattle?

A. Carter, MacDonald & Co. for fifteen years.

Q. Did you have a broker's license when you were working for them? A. Yes.

Q. Whenever you go out and sell a piece of real estate for some other rival firm today, then you and Broderick split the fee, do you not?

(Testimony of Melville Wilson.)

A. I'm not sure that I understood.

Q. I say,—if you got a piece of real estate now and you [104] sold it for John Davis & Co., Davis would get the other half of the fee and you and Broderick would get half the fee?

A. That is right.

Q. You would split it with Henry Broderick while they didn't do any work on it at all?

A. Yes, sir.

Q. In these meetings every morning, you discuss listings? A. Yes.

Q. When you were given certain listings, in accordance with the contract—

A. I am given all commercial listings. They are the only ones I want.

Q. —are you given any exclusive possession of any listings? A. Oh, no.

Q. Just the commercial listings?

A. I get all the commercial listings.

Q. Who else works on commercial listings?

A. Ross Downs, Henry Binker, Jack Sewart, Paul Evans, Connie Opperman.

Q. Well, what territory do you mostly cover?

A. Wherever I want to.

Q. Well, I mean—

A. In Seattle and out.

Q. In Seattle and out? [105]

A. Yes. Any part of the commercial district of Seattle. Business.

Q. You specialize in business or commercial sales primarily? A. Yes.

(Testimony of Melville Wilson.)

Q. You don't want to be under the Social Security Act, do you, Mr. Wilson? You don't want to be covered by it?

A. I don't know much about it—I don't want anyone bossing me.

Q. Huh?

A. I don't want anyone bossing me.

Q. Well, you know that you don't want to be under covered employment, don't you?

A. I don't want anyone bossing me, just what I said.

Q. That's the reason you say you're not working for anybody. Is that—

A. I'm a free lance. I can work when I want to, if I want to. And I want to be that way.

Q. Well, if you were under unemployment compensation, it wouldn't change your setup now would it?

A. I don't know. I don't know when a real estate broker would be unemployed—I don't know how you'd figure it out. You're kinda working under your hat most of the time. I don't know when you would become unemployed. I don't know how you'd figure it—what an unemployed [106] real estate broker would be, I don't know.

Q. Well, you'd be unemployed if you didn't have any listings, wouldn't you?

A. Well, I'd go out and get some.

Mr. Winter: I think that's all.

The Court: Now these ads that you say run in the paper, you say your name is attached to them?

The Witness: Yes.

(Testimony of Melville Wilson.)

The Court: Are they yours individually or are they sent out of Henry Broderick, Inc.?

The Witness: No, Henry Broderick, Inc., name appears, and the ads, while they are put in on a copy that I want them put in, anyone can work the property that wants to. I don't have any exclusive——

The Court: But your name appears and it's a matter of see Mr.——

The Witness: That's right. I have my name in there and the—the normal call, unless they knew someone in the office, would be to call the man that advertised—the man that's got his name in there.

The Court: Well, you don't take such an ad down to the newspapers, do you?

The Witness: Oh, no. The papers call in and get our ads.

The Court: You say "our ads", you mean——

The Witness: All the brokers—any ads that are put in by any of the brokers——

The Court: No, what I'm trying to get at—the brokers there, do they have a separate advertising, an individual advertising system or plan, or does the company—the corporation put in an ad and carry what the broker submits?

The Witness: As a normal thing, these ads are given to Mr. Boynton and the papers—the man from the newspaper comes to his desk and picks them up and takes them up and puts them in.

The Court: Then they appear under the general head of Henry Broderick, Inc.——

(Testimony of Melville Wilson.)

The Witness: The name, Henry Broderick, Inc., appears in the ad as well as my name.

The Court: Well, your name appears on the item but there may be many items in the ad?

The Witness: I never had one advertised, I don't believe, that wasn't a single ad by itself. It doesn't appear in a column of ads as my own.

The Court: And all the brokers operate that way——

The Witness: No, some of them put ads in a column or several columns.

The Court: Who pays for that? [108]

The Witness: The office pays for the advertising.

The Court: And is that charged back against the commission profits?

The Witness: No. They pay for the advertising.

The Court: But all the rest of the brokers can work on that property if they wish?

The Witness: The property is open to anyone in the office. Anyone can work on it.

The Court: Don't you find that perhaps you may have some conflict of interest?

The Witness: Oh, once in a while somebody beat my time to a sale, but next time I'll beat them, possibly. We pay no attention to that. You work until you get a sale or lose it, whichever happens to come.

The Court: As far as the buyer or seller is concerned, all documents in connection with it bear the name of the corporation, is that correct?

The Witness: Unless I happen to use a form of

(Testimony of Melville Wilson.)

the Washington Title Insurance Co. or the Puget Sound Title Insurance Co.

The Court: Well then, do you then not put the corporation's name in there at all?

The Witness: Sometimes I do, sometimes not. I use my own name if it happens to come that way. I [109] sign all earnest money receipts personally without—ah—Henry Broderick, Inc.

The Court: You don't use their—

The Witness: I use their form or any other form that is a suitable one, but I sign a personal receipt for the money. I don't say "Henry Broderick, Inc. by myself."

The Court: Do you have your business card with you?

The Witness: Yes.

The Court: I think I'm going to have that marked. While that's being—

Mr. Winter: I'd like to suggest that we have Mr. O'Brien's marked, and Mr. Ross Downs' marked at the same time.

The Court: Do you have any objection to that? While they are examining those things I want to ask you another question. When you use some form that doesn't in any way identify the corporation here as being connected with the transaction, either whether it be a transaction completed immediately or a transaction in prospect, do you account for the money immediately to the Henry Broderick, Inc.?

The Witness: Not always. Sometimes I hold it

(Testimony of Melville Wilson.)

until I've got both sides of the deal signed up. As [110] a matter of convenience, it's better for me if I don't do that. It's better to have the money put in the safe, put away in a safe place rather than have it laying loose anywhere.

The Court: Well, the owner or the prospective buyer, when you give them your address, do you give it at your home or do you give it—

The Witness: No, I give it at Henry Broderick, Incorporated.

The Court: What I'm trying to get clear—do you identify yourself as being connected with the Henry Broderick & Co. or as an independent broker.

The Witness: I am an independent broker and I tell everybody that. An independent broker associated with Henry Broderick, Incorporated.

The Court: But what money you get in the way of compensation for your services, you ultimately get from Henry Broderick & Co.

The Witness: Not always, no. I get quite a few direct from either the buyer or seller.

The Court: Then you operate different from the other members, apparently, from the testimony of the officers of the corporation.

The Witness: That might be. I get—I've had [111] quite a few checks that were made payable to me.

The Court: And you never turned them in to them at all?

The Witness: Yes, oh, yes.

The Court: Well, that's what I'm trying to get

(Testimony of Melville Wilson.)

clear. When you get your share, you get it on their check?

The Witness: Either I give them a check for the amount that is due them or give them the whole check and let them give me back part of it.

The Court: Well, if you take the former course, then, of course, you don't handle the transaction as their books disclose here.

The Witness: The money would come in to their account. What they do with it, I don't know.

The Court: Any representation you might make, I'm not meaning to imply that you did, or any controversy that grows out of your business transactions, you don't—you never represent the Henry Broderick & Co. in the transaction?

The Witness: I don't have controversies.

The Court: Oh, you're no more perfect than the average human being—

The Witness: But I've had no controversies [112] on the subject of real estate,—

The Court: Have never had any misunderstandings in your real estate—

The Witness: No, not where there is any money involved.

The Court: Either with buyer or seller, huh?

The Witness: No. Never did.

The Court: That's all.

Mr. Eggerman: That's all.

(Witness excused.)

Mr. Eggerman: The plaintiff rests. [113]

The Court: Now, I'll hear from you.

(Whereupon argument by respective counsel.)

The Court: I'll give you ten days in which to serve and file your brief—I'll give you—give you five days subsequent to the service of the brief to file a reply brief. I'll state to both counsel that this whole situation presents a rather complex question because it is in that zone—shadow zone or twilight zone between the two classifications of either master and servant or independent contractor.

We'll adjourn court until 10:00 o'clock tomorrow.

(Whereupon adjournment was taken.)

CERTIFICATE

I, Russell N. Anderson, official court reporter for the above-entitled court, do hereby certify that the foregoing is a true and correct transcript of the matters therein set out.

/s/ RUSSELL N. ANDERSON,
Official Court Reporter. [114]

[Endorsed]: No. 11596. United States Circuit Court of Appeals for the Ninth Circuit. Henry Broderick, Inc., Appellant, vs. Clark Squire, individually and as Collector of Internal Revenue for the District of Washington, Appellee. Transcript of Record. Upon Appeal from the District Court

of the United States for the Western District of Washington, Southern Division.

Filed April 24, 1947.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11596

HENRY BRODERICK, INC.,

Appellant,

vs.

CLARK SQUIRE, individually and as Collec-
tor of Internal Revenue for the District of
Washington,

Respondent.

APPELLANT'S STATEMENT OF POINTS ON
WHICH IT INTENDS TO RELY ON AP-
PEAL AND DESIGNATION OF THE REC-
ORD DEEMED NECESSARY FOR THE
CONSIDERATION THEREOF.

Comes now Appellant and, pursuant to Subdivi-
sion 6, Rule 19, of the Rules of the United States
Circuit Court of Appeals for the Ninth Circuit,

herewith adopts the statement of points filed in the District Court upon which Appellant intends to rely on appeal, and herewith designates the entire transcript of record as prepared and certified by the Clerk of the District Court, to be printed for purposes of this appeal.

Dated this 23rd day of April, 1947.

/s/ D. G. EGGERMAN,
/s/ JOSEPH J. LANZA,
EGGERMAN, ROSLING &
WILLIAMS,
Attorneys for Appellant.

Service of the foregoing, by receipt of true copy thereof, is hereby acknowledged this 23rd day of April, 1947.

/s/ J. CHARLES DENNIS, (GM)
U. S. District Attorney,
Attorney for Respondent.

[Endorsed]: Filed April 24, 1947.

